IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

[redacted] 40

No. 902 MISC.

WILLIAM JOE JOHNSON, Petitioner,

v.

HARRY S. AVERY, COMMISSIONER,
DEPARTMENT OF CORRECTION,

and

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
NASHVILLE, TENNESSEE, Respondents.

PIERCE WINNINGHAM III
Attorney at Law
1035 Third National Bank Building
Nashville, Tennessee

KARL P. WARDEN
Associate Professor of Law
Vanderbilt Law School
Nashville, Tennessee

BRUCE E. GAGNON
Assistant Professor of Law
Vanderbilt Law School
Nashville, Tennessee

INDEX

CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

WILLIAM JOE JOHNSON, Petitioner,

v.

HARRY S. AVERY, COMMISSIONER,
DEPARTMENT OF CORRECTION,

and

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
NASHVILLE, TENNESSEE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILLIAM JOE JOHNSON, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on August 31, 1967.

CITATIONS OF OPINIONS BELOW

The memorandum opinion of the District Court, printed in Appendix B hereto, infra, p. 13, is reported in 252 F. Supp. 783 (M.D. Tenn. 1966). The opinion of the Circuit Court of Appeals, as yet unreported, is printed in Appendix B hereto, infra, p. 18.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1967. Appendix B, infra, p. 18. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writ of habeas corpus and other legal papers, when no other help is available, is invalid under 28 U.S.C. § 2242 or the United States Constitution.

(2) Whether a federal district court may intervene with a writ of habeas corpus to prevent prison officials from enforcing disciplinary sanctions against a prisoner for violation of a prison regulation which conflicts with federal law.

STATUTE INVOLVED

The statutory provision involved is 28 U.S.C. § 2242 (1964), printed in Appendix A, infra, p. 12.

STATEMENT OF FACTS

Petitioner, a prisoner in the Tennessee State Penitentiary, was placed in solitary confinement for violating a prison regulation which forbids inmates to "advise, assist or otherwise contract to aid" another inmate, either with or without a fee, in the preparation of petitions for habeas corpus or other legal papers. After serving eleven months in solitary confinement, petitioner sought relief in federal district court under the Civil Rights Act of 1964. Construing the motion as a petition for habeas corpus, the District Court held that the prison regulation conflicted with 28 U.S.C. § 2242, and had the effect of suppressing the assertion of federal constitutional rights in court by prisoners who are incapable of drafting

their own petitions; the Court therefore ordered the release of petitioner from solitary confinement. On appeal, the Court of Appeals for the Sixth Circuit reversed; while that Court agreed with the District Court that petitioner had standing to question the validity of the prison regulation, and that a petition for habeas corpus was an appropriate procedure to attack the validity of disciplinary confinement, the Court held that judicial review of the internal affairs of a prison should be granted only in cases which clearly demonstrate an interference with fundamental constitutional rights. The Court went on to say that Tennessee has an undisputed right to regulate the practice of law within its boundaries, and that neither the Constitution nor 28 U.S.C. §2242 provided a prison inmate a right to assist another inmate in legal matters.

REASONS FOR GRANTING THE WRIT

Both opinions below indicate that this is a case of first impression and undoubted importance. It deals with the power of prison officials, not reasonably to regulate, but absolutely to prohibit, the activities of "jailhouse lawyers." It should be noted that while an indigent prisoner may be able to obtain the assistance of court-appointed counsel in both federal and Tennessee habeas corpus proceedings after he has presented a case with sufficient merit to entitle him to a hearing (see 28 U.S.C. §1915(d)(1964) and Tenn. Code Ann. §40-2014 (1966)), there is no provision under either law for the appointment of counsel in the preparation of petitions. It is in this

context that the prison regulation should be viewed. From its experience with habeas corpus petitions, the District Court noted that many prisoners, inarticulate, illiterate or of substandard intelligence, would be "totally incapable of preparing an intelligible petition" without assistance of some kind. The District Court also observed that the prison officials have not provided means through which illiterate prisoners could obtain access to qualified attorneys. Of course, the same educational, psychological or mental deficiencies which make it impossible for a prisoner independently to draft an intelligible petition would also make it unlikely that he could draft a letter which may arouse an attorney's interest. A further impediment to outside assistance by an attorney is the fact that the great majority of prisoners are indigent and unable to pay a legal fee, and few attorneys are willing to travel to the state penitentiary to listen to the story of an indigent prisoner. In this context, it becomes even more acute that a prisoner who is incapable of drafting his own petitions receive the assistance of another [illegible]soner. Petitioner believes that the effect of the prison [illegible]ation is to block access to federal or state courts for many [illegible]soners; such a regulation strikes at the very threshold of the only entrance to the courts. Petitioner further believes that the regulation conflicts with decisions of this Court to the effect that prison officials may not block prisoners' access to federal courts. See, e.g., Dowd v. United States ex rel Cook, 340 U.S. 206 (1951); White v. Ragen, 324 U.S. [illegible] (1945);

Cochran v. Kansas, 316 U.S. 255 (1942); Ex Parte Hull, 312 U.S. 546 (1941).

In 1948, 28 U.S.C. §2242 was amended to read: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf." (Emphasis added to show amendment). The District Court construed this provision to grant a federal statutory right to assistance by fellow prisoners in preparing petitions in the absence of an acceptable alternative means of assistance. Petitioner believes that since §2242 authorizes a person to "sign and verify" a petition for another, and in effect present the petition to the Court, that, a fortiori the section authorizes such a person to assist in drafting a petition. Moreover, the amendment to §2242 was not designed to restrict common law rights in habeas corpus petitions, but was intended to reflect "the actual practice of the courts." See H.R. Rep. No. 308, 80th Cong., 1st Sess., A 178 (1947). Thus, even if the amendment to §2242 does not create a federal right to assist in preparing a federal habeas corpus petition, the amendment would not, and perhaps could not, affect the existence of such a right under general federal habeas corpus law. Numerous decisions affirm the right of one party to petition for habeas corpus for a second party if it is shown that the second party was incapable of filing his own petition. See, e.g., Nash v. MacArthur 184 F. 2d 606 (D.C. Cir. 1950); Collins v. Traeger, 27 F. 842 (9th Cir. 1928);

United States ex rel Bryant v. Houston, 273 Fed. 915 (2d Cir. 1921). Indeed, this court has recognized the rule permitting a properly authorized third party to appear in behalf of another who is incapable of presenting a petition, see Rosenburg v. United States, 346 U.S. 273, 291 (1953) (dictum), and has heard cases on habeas corpus raised by third persons: See, e.g., United States ex rel Accardi v. Shaughnessy, 347 U.S. 260, 263 (1954); United States ex rel Toth v. Quarles, 350 U.S. 11 (1955). This rule is designed to insure that habeas corpus is equally available to persons who are incapable of preparing a petition, and since the rule permits one person to prepare a petition and appear before the court for another, the rule should protect a person who assists in preparing a petition even though he cannot, because of his status, argue before the court. While the purpose of the rule is to protect the rights of the incapacitated or illiterate prisoner to receive assistance, it necessarily creates a concomitant right in others to give assistance. Otherwise the right to receive assistance would in most cases be rendered ineffective, since to deny the person giving assistance is to deny the prisoner who cannot help himself. Cf. Edwards v. California, 314 U.S. 160 (1941), where defendant's conviction for assisting in indigent nonresident to enter the state was struck down, even though, as noted by Douglas, J., concurring, the primary right to freedom of movement was in the person assisted.

The Court of Appeals upheld the validity of the prison regulation on the basis of the "undisputed right" of individual states to regulate the practice of law within its boundaries. However, recent cases indicate there is a limit on the state's power to regulate the practice of law when the

regulation has the practical effect of restricting the ability of unsophisticated persons to seek legal redress in courts. See Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). Moreover, as mentioned earlier, petitions of habeas corpus presented by a "next friend" have long been permitted by the courts, (see e.g., Nash v. MacArthur, 184 F.2d 606 (D.C.Cir. 1950); Collins v. Traeger, 27 F.2d 842 (9th Cir. 1928); United States ex rel Bryant v. Houston, 273 Fed. 915 (2d Cir. 1921)), and this practice has never been viewed as an unauthorized practice of law. Even in Tennessee state courts, petitions prepared by other inmates have been permitted. See Tennessee ex rel Dawson v. Henderson, a 1967 unreported decision of the Tennessee Supreme Court (printed in Appendix C, infra p. 22), in which the court held that a hearing must be granted on a petition which, as the court acknowledged, was prepared by a prison "writ writer" (a copy of that petition, in fact prepared by William Joe Johnson, petitioner in this case, is printed in Appendix C, infra, p. 28). More important, the traditional reason given for the state's authority to regulate the practice of law is that the state has an interest in protecting unwary clients from the consequences of bad advice given by unscrupulous or ill-trained attorneys. Legal advice in preparing a petition for habeas corpus, however, whether by trained counsel or by a fellow prisoner, will not have permanent detrimental effects, since the petitioner is always able to present later petitions. Also, unlike the practice of law generally, the preparation of petitions, such as in this case,

is directly within the supervision of the court, which is in a position to prevent abuses and limit the consequences of bad advice. It must also be recognized that a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an acceptable petition can be prepared by a person with a minimum of legal knowledge. Of course, the best legal advice can be received from a licensed attorney, but under the circumstances, prisoner assistance is certainly preferable to the alternative of no assistance at all.

The prison regulation in this case makes no distinction between federal court and state court petitions, and the record does not show whether petitioner was disciplined for assisting in a federal or a state court petition. Petitioner believes this should not matter. As to federal court petitions, the state should not be permitted to discipline a prisoner for conducting an activity which is authorized and acknowledged by a federal district court, since the practice of law before a federal court is peculiarly within the province and supervision of the federal court and should not be subject to state regulation. See Sperry v. Florida, 373 U.S. 379 (1963); Spanos v. Skouras, 364 F.2d 161 (2d Cir. 1966); Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964). Furthermore, if there is a right to assist in federal court but not state court petitions, the prison regulation, absolute on its face, should be held invalid because of its inhibitive affects on protected activity (assistance in federal petitions), even though petitioner was disciplined for assisting in a state petition. See Thornhill v. Alabama, 310 U.S. 88 (1940). More important, petitioner believes that the right to assistance should be applied

with equal vigor to state petitions, in view of the fact that a prisoner, in order to attack a conviction by federal habeas corpus, must "exhaust his state court remedies." The state proceeding would become a stumbling block to federal relief if he cannot have assistance in the state petition, since he may not be able to prepare an intelligible petition, without assistance, sufficiently to raise the merits in the state court to "exhaust his state remedies." Moreover, since the state has made available habeas corpus proceedings (see Tenn. Code Ann. Section 23-1801 (1955)), a prison regulation which has the effect of making these procedures available only to literate or wealthy prisoners violates the equal protection clause of the Fourteenth Amendment. See Smith v. Bennett, 365 U.S. 708 (1961) (Filing fee for state habeas corpus petitions held invalid.)

A remaining question is whether a federal court should issue an order for petitioner's release from solitary confinement, when such an order may interfere with the internal administration of the prison. The Court of Appeals relied on the traditional reluctance of federal courts to review the internal administration of a prison. Nevertheless, that Court also found that the prison regulation was valid, so it was not faced with the dilemma of holding there was a federal right but no federal remedy. While federal courts have been generally reluctant to review decisions of prison management, this reluctance has not been without exception,

particularly when the prison practice in question jeopardizes access to federal courts by inmates. See, e.g., Dowd v. United States ex rel Cook, 340 U.S. 206 (1951); White v. Ragen, 324 U.S. 760 (1945); Cochran v. Kansas, 316 U.S. 255 (1942); Ex parte Hull, 312 U.S. 546 (1941). Also, in this case the court would not be supervising the regulation of internal prison affairs, since the only effect of a court order would be negative in character: it would prevent the enforcement of an invalid regulation. No affirmative duty would be imposed on prison officials by virtue of the writ.

Petitioner recognizes that problems of discipline and inmate morale might justify regulation of "jailhouse lawyers." One state has solved this difficulty by providing an alternative means of assistance to prisoners through a public defender program. See Ind. Stat. Ann. §§13-1401 to 13-1406 (1956). In New Jersey, prisoners may receive assistance from licensed attorneys in preparing petitions by virtue of a New Jersey Supreme Court rule. See Rossmore & Koenigsberg, Habeas Corpus and the Indigent Prisoner, 11 Rutgers L. Rev. 611 (1957). In any event, the District Court in this case was not unaware of disciplinary problems:

> This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers," activities which doubtless cause many problems, including problems of prison discipline and morale. It may be, for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered, if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to

prison inmates any reasonable alternative, such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or applications for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect of silencing forever any constitutional claims which many prisoners might have. (Appendix B, infra, p. 14-15.)

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Karl P. Warden

Counsel for petitioner

CERTIFICATION OF SERVICE

I certify that I have, on this _____ day of November, 1967, mailed by first class mail, a copy of the foregoing Petition for a Writ of Certiorari to respondents' attorney of record, Henry C. Foutch, the Assistant Attorney General for the State of Tennessee, to his address at the Supreme Court Building, Nashville, Tennessee, air mail postage prepaid.

Karl P. Warden

APPENDIX A

28 U.S.C. § 2242 (1964)

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

corpus petitions for other prisoners. Such solitary confinement is to continue until terminated on order of the Commissioner of Corrections.

This Court is aware of the extraordinary case load imposed upon the federal courts by the steadily increasing number of habeas corpus applications. In the past calendar year, this Court formally disposed of approximately 170 petitions, or nearly one formal disposition every 1½ work days. This number does not include the very substantial number of informal dispositions by letter or otherwise. Still, the prison regulation in question cannot be justified as an attempt to lessen the work load of the courts, for that is a problem which must be dealt with by the courts, and not by prison officials.

The present case presents a question of first impression and of undoubted importance. From the Court's experience with habeas corpus petitions, it is apparent that without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter or request on their own behalf. The respondent does not deny this, but asserts that the solution is for such a prisoner to contact a licensed attorney to act in his behalf. Of course, the same incapacities (sub-standard intelligence, inability to write, etc.), which make it impossible for a prisoner to draft a meaningful habeas corpus petition also make it impossible for him to draft a letter which would be sufficient to arouse the attorney's interest. Furthermore, few indeed would be the lawyers who would volunteer to represent such prisoners, the great majority of whom are totally indigent.

For all practical purposes, if such prisoners cannot have the assistance of a "jail-house lawyer", their possibly

Memorandum Opinion

In the
DISTRICT COURT OF THE UNITED STATES
For the Middle District of Tennessee
Nashville Division.

WILLIAM JOE JOHNSON,
Petitioner,

v.

HARRY S. AVERY, Commissioner Department of Correction, and C. MURRAY HENDERSON, Warden, Tennessee State Penitentiary, Nashville, Tennessee,
Respondents.

Civil No. 4170.

Memorandum.

This proceeding was begun as a motion for law books, a typewriter, and release from solitary confinement under 28 U. S. C. A., Sec. 1343 (3) and the 1964 Civil Rights Act. It is, in its essential aspects, a petition for a writ of habeas corpus, and it is so construed. The case comes on to be heard upon the petition and return, a hearing, and post-hearing briefs. It is not clear whether the petitioner has presented his claim of illegal confinement under maximum security to the state courts, but in any event under present state rulings the habeas corpus remedy in Tennessee would not be adequate to reach this question on its merits.

For the past eleven months, the petitioner has been kept in solitary confinement in the state penitentiary for the sole and admitted reason that he has violated a prison regulation which forbids prisoners from preparing habeas

verified". Certainly, if a prisoner is incapable of signing and verifying a petition, he is incapable of preparing one. The objection, in any event, would be insignificant since, in the future, the petitioner could actually sign and verify the petitions which he prepares.

Of course, the purpose of the statute is not to protect the petitioner, but to protect the constitutional rights of persons who are incapable of asserting their own rights. The situation, then, is this. Prisoners have a federal right to petition for a writ of habeas corpus. They have also a federal statutory right to have this remedy made effective by authorizing some third party to proceed in their behalf. Other prisoners have authorized the petitioner to do just that, and for his assistance the prison officials have placed him in solitary confinement for eleven months. Clearly, by the instant regulation, the prison officials have interfered with the statutory right of prisoners, incapable of acting for themselves, to have someone act on their behalf just as surely and effectively as if the officials had made it an offense for such prisoners to request such assistance. No matter how it is analyzed, the effect of the prison regulation now in question is to deprive these prisoners of their federal statutory right to have a habeas corpus petition filed on their behalf by a third party. This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers", activities which doubtless cause many problems, including problems of prison discipline and morale. It may be for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to prison inmates any reasonable alternative,

valid constitutional claims will never be heard in any court. At stake, then, is not only the claim of the instant petitioner, but more importantly, under the broad terms of the regulation, the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests or petitions of their day in court. Without some assistance, their right to habeas corpus in many instances becomes empty and meaningless. It is within this framework that we must examine the instant petition.

The common law and the courts have not been blind to similar problems. There are numerous cases which affirm the right of one party to petition for a writ of habeas corpus on behalf of a second party whenever it is shown first, that the petition is authorized by the second party, and second, that the second party is himself incapacitated or incapable of filing a petition. See, for example, United States ex rel. Funaro v. Watchorn, 164 F. 152 (S. D. N. Y., 1908), and Collins v. Traeger, 27 F. 2d 842 (9th Cir., 1928).[1] These cases prompted the revisers to amend 28 U. S. C. A., § 2242 so that it now reads:

> Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. (Emphasis supplied to reflect amendment.)

By preparing petitions for other prisoners, the petitioner is certainly acting in their behalf. True, he does not actually sign or verify the petition, or himself submit it to the Court, but the statute may easily and justly be interpreted to include the lesser act of assistance in preparation of the petition within the meaning of "signed and

1 See also, Ex Parte Dostal, 243 F. 664 (N. D. Ohio, 1917); United States ex rel. Bryant v. Houston (2d Cir., 1921); Nash v. MacArthur, 184 F. 2d 606 (D. C. Cir., 1950); and Wilson v. Dixon, 256 F. 2d 536 (9th Cir., 1958) (one prisoner on behalf of another prisoner—denied for lack of authorization.)

prison regulation in question raised solely questions of state law, or if there were not available reasonable alternatives to the present regulation. But, as we have seen, neither of these conditions exists in this case.

The final objection, that habeas corpus will not lie to challenge the petitioner's custody in solitary confinement since he could not be released from total confinement, is answered by the well-reasoned and controlling case for this circuit, **Coffin v. Reichard**, 143 F. 2d 443 (6th Cir., 1944), in which the Court of Appeals ruled, in part, as follows:

> A prisoner is entitled to the writ of habeas corpus when, though lawfully in custody, he is deprived of some right to which he is lawfully entitled even in his confinement, the deprivation of which serves to make his imprisonment more burdensome than the law allows or curtails his liberty to a greater extent than the law permits.
>
> . . . A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law. . . . When a man possesses a substantial right, the courts will be diligent in finding a way to protect it. The fact that a person is legally in prison does not prevent the use of habeas corpus to protect his other inherent rights (p. 445).

See also, **Alexander v. Rundle**, 34 Law Week 2263 (Pa. Sup. Ct. 11/10/65); **Stevens v. Myers**, 34 Law Week 2189 (Pa. Sup. Ct., 9/29/65); and **Martin v. Commonwealth of Virginia**, 349 F. 2d 781 (4th Cir., 1965), in which the Court stated:

> Ordinarily, a prisoner may resort to federal habeas corpus to make a collateral attack on federal consti-

such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or application for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect of silencing forever any constitutional claims which many prisoners might have.

The question is whether this prison regulation, not directly authorized by state statute or state law, can be allowed to nullify a federal statute and, in turn, to suppress the assertion of a federal constitutional right. The question answers itself.

The only problems remaining are technical in nature and may be quickly disposed of. The complaining party in this proceeding is not a prisoner denied the assistance of petitioner in preparing an application for habeas corpus relief, and a question of standing is presented. The stated purpose of the petition is to secure petitioner's release from solitary confinement so that he may continue to assist other prisoners in the preparation of their habeas corpus petitions. Hence, the instant petition is at least indirectly filed on behalf of the other prisoners. Furthermore, it will be seen that if the petitioner cannot assert the rights of the other prisoners, the same incapacities which prevent them from asserting their constitutional rights will prevent them from asserting their statutory rights under Sec. 2242. The objection is circular, and cannot prevail. The respondent further objects to any action which this Court might take since it might disrupt the administration and internal workings of the prison. Of course, that objection might be well founded if the

> ful restraints upon their liberty." Several states have already adopted this view, expanding in recent years the concept of habeas corpus to permit a prisoner to litigate his right to liberty at a future date.

Furthermore, it should be noted that the relief sought in the present case is, in fact, to release the petitioner from custody—from the very real custody of solitary confinement which is, in a sense, a jail within a jail. Thus, even if the Supreme Court were to follow **McNally v. Hill** today, the holding in that case would not prevent habeas corpus relief under the facts of the present case. Under the ruling in **Coffin v. Reichard**, *supra*, even though the petitioner is lawfully confined in the penitentiary, he has a right not to have confinement made more burdensome by being placed for an indefinite period in solitary confinement solely for violating a prison regulation which the Court now holds to be in direct conflict with 28 U. S. C. A., § 2242 and, therefore, void. Absent such regulation, there is no justification for the petitioner's custody in solitary confinement. His confinement, therefore, is arbitrary and capricious, and a violation of his rights under the Fourteenth Amendment.

There is also before the Court a motion to require the respondents to furnish the petitioner with good and wholesome food. In light of the disposition of his habeas corpus petition, no decision will be necessary on this motion. No consideration need be given to petitioner's request that he be furnished with a typewriter, since that request has now been withdrawn. Finally, petitioner has requested the Court to furnish him with various legal materials and Supreme Court reports. The Court agrees with the respondent that the state is not required to furnish these materials and reports to the petitioner. See, for example, **Barber v. Page**, 239 F. Supp. 265 (E. D. Okla., 1965).

tutional grounds upon his state court conviction. The federal habeas corpus statute, 28 U. S. C. A., § 2241 (1959), makes the writ available for this purpose if the prisoner is "in custody in violation of the Constitution * * * of the United States. * * *" Over thirty years ago, the Supreme Court held that a sentence which the prisoner had not begun to serve did not satisfy the statutory requirement of "custody" even though a result of the challenged sentence was to thwart his eligibility for parole. McNally v. Hill, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238 (1934). If this decision stood alone, unqualified by later decisions of the Supreme Court, we as a lower court would be bound to follow it. Since then, however, the Court has relaxed the strictness of this interpretation and held that one on parole is in "custody" within the meaning of the term as used in 28 U. S. C. A., § 2241. Jones v. Cunningham, 371 U. S. 236, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963). Still later, the Court in broad terms, equated "custody" with "restraint of liberty." Fay v. Noia, 372 U. S. 391, 427, 83 S. Ct. 822, 9 L. Ed. 2d 837 (1963).

In light of these progressively developing notions as to the scope of the writ of habeas corpus, there is reasonable ground for thinking that were the Supreme Court faced with the issue today, it might well reconsider McNally and hold that a denial of eligibility for parole is a "restraint of liberty" no less substantial than the technical restraint of parole. Indeed, in Jones v. Cunningham, 371 U. S. 236, 243, 83 S. Ct. 373, 377, the Court said: "[Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrong-

Furthermore, the Court notes that habeas corpus petitions need not, and indeed should not, contain extensive legal citations. All that is required is a short, simple and intelligible statement of the facts upon which this petitioner bases his claim for relief. Consequently, petitioner's request for legal materials and reports is hereby denied. For the reasons stated above, however, the Court holds that the petitioner should be released from solitary confinement and restored to his status as an ordinary prisoner. An order will be submitted accordingly.

/s/ WM. E. MILLER,
United States District Judge.

Attest: A True Copy.

BRANDON LEWIS, Clerk,
U. S. District Court,
Middle District of Tennessee,
By: L. M. EDWARDS, D. C.

(Seal)

No. 17292

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

WILLIAM JOE JOHNSON,
Petitioner-Appellee,
v.
HARRY S. AVERY, Commissioner of Correction, and
C. MURRAY HENDERSON, Warden, Tennessee State Penitentiary,
Respondents-Appellants.

APPEAL from United States District Court, Middle District of Tennessee, Nashville Division.

Decided August 31, 1967.

Before WEICK, Chief Judge, PECK, Circuit Judge, and CECIL, Senior Circuit Judge.

WEICK, Chief Judge. The crux of this case is the question of validity of a regulation of the Tennessee State Penitentiary at Nashville, which prohibits any inmate from advising or assisting other prisoners in the preparation or filing of writs of habeas corpus or other legal papers.[1] The regulation was promulgated and enforced by the defendants-appellants in

---

[1] Guidance Manual for Prisoners, Sec. VI, page 7:

"No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

The perspective through which we view this question, even though it seems one of first impression, must be framed by the well-established reluctance of the Federal Courts to intervene in internal affairs of state or Federal penal institutions. Regulations for the administration and discipline of prisons, promulgated and enforced by duly authorized officials, are not subject to review by the courts unless it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the Constitution. *United States* v. *Marchese*, 341 F.2d 782 (9th Cir. 1965) *cert. denied* 382 U.S. 817 (1965); *McCloskey* v. *Maryland*, 337 F.2d 72 (4th Cir. 1964); *Kirby* v. *Thomas*, 336 F.2d 462 (6th Cir. 1964); *Sostre* v. *McGinnis*, 334 F.2d 906 (2nd Cir. 1964) *cert. denied* 379 U.S. 892 (1964); *Childs* v. *Pegelow*, 321 F.2d 487 (4th Cir. 1963) *cert. denied* 376 U.S. 932 (1964); *Hatfield* v. *Bailleaux*, 290 F.2d 632 (9th Cir. 1961) *cert. denied* 368 U.S. 862 (1961); *Siegel* v. *Ragen*, 180 F.2d 785 (7th Cir. 1950) *cert. denied* 339 U.S. 990 (1950).

This proposition is soundly based on the fact that prison administration is a function of the executive branch of the Government and one for which the courts, with their limited experience and facilities, are ill-suited to undertake. Further, in this case the imperatives of our Federal system require special concern for the boundaries of state and Federal governmental competence as allocated by our basic charter.

An important additional consideration here is the undisputed right of individual states to specify the qualifications for entrance to their respective bars and to regulate the practice of law within their borders. *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961); *In re Anastaplo*, 366 U.S. 82 (1961); *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872); *Emmons* v. *Smith*, 149 F.2d 869 (6th Cir. 1945) *cert. denied* 326 U.S. 746 (1945); *Niklaus* v. *Simmons*, 196 F. Supp. 691 (D. Neb. 1961). See also *Theard* v. *United States*, 354 U.S. 278 (1957); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

While the interests of the states are sometimes deemed less

their official capacities as Commissioner of Correction of the State of Tennessee and Warden of the State Penitentiary, respectively.

After being subjected to punishment for repeated violations of the rule, usually by confinement in the "maximum security building" of the prison, petitioner filed a "motion for law books and a typewriter", which the District Court treated as an application for a writ of habeas corpus, and granted. The prison authorities appealed.

The District Court reasoned that because the words of the habeas corpus statute, 28 U.S.C. § 2242, authorized the filing of an application for a writ of habeas corpus "signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*" (emphasis added), the prison regulation conflicted with the Federal law. The District Court further held that unless petitioner could continue to serve as a "writ writer" or "jailhouse lawyer" for his fellow inmates, their constitutional rights to the effective aid of habeas corpus would be endangered since "without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter, or request." We must disagree with both of these conclusions.

At the outset, we agree with the holding of the District Court that petitioner has standing to question the validity of the regulation. While defendants urge that petitioner himself has never been denied the right to file petitions on his own behalf in Federal or state courts, it seems clear that he has been subjected to a restraint upon his liberties unauthorized by the life sentence he is serving. In such a case, habeas corpus will lie to inquire into the lawfulness of this added punishment, even though it will not result in his unconditional release from prison. *Martin* v. *Commonwealth of Virginia*, 349 F.2d 781 (4th Cir. 1965); *Coffin* v. *Reichard*, 143 F.2d 443 (6th Cir. 1944) *cert. denied* 325 U.S. 887 (1945).

was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders.

While we agree that representation by counsel may be a significant part of the post-conviction remedy, it is important to recognize that the Supreme Court has not yet held that it is an indispensable element of due process under the Constitution. Several circuits have stated the advisability of appointing counsel. *Taylor* v. *Pegelow*, 335 F.2d 147 (4th Cir. 1964); *Dillon* v. *United States*, 307 F.2d 445 (9th Cir. 1962); *United States* v. *Wilkins*, 281 F.2d 707 (2d Cir. 1960). However, it is not required in every such case, *Barker* v. *Ohio*, 330 F.2d 594 (6th Cir. 1964). In any event, the Federal Courts have power to appoint counsel for indigents in proceedings before them to assure the protection of the indigents' rights. 28 U.S.C. § 1915(d).

The same concern for effectuating basic Constitutional rights through representation by counsel, which motivated the District Court in this case, is evidenced in recent cases in which the Supreme Court has defined the need for counsel in "critical" pre-trial stages, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Wade*, — U.S. — (1967), as well as at trial, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Yet in none of those cases did the Court indicate that these rights could be protected through representation by a layman. To the contrary, the Court has consistently emphasized that it is representation *by trained counsel* which is necessary to take advantage of the full scope of an accused's rights and shield him from unfair tactics or his own ignorance.

We agree with this approach to the problem of effectuating Constitutional rights both as to pre-trial events and post-con-

significant than those provisions of the Constitution upon which they may impinge, see *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964), *NAACP* v. *Button*, 371 U.S. 415 (1963), *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), it is interesting to note that in all cases where the state's regulatory power was limited in deference to Constitutional standards, the practitioners involved were all concededly qualified to practice law by previous academic training. In no case has the Constitution been read to grant an untrained and unlicensed person the right to practice law.

The State of Tennessee has enacted a series of statutes governing qualification and admission to the practice of law, T.C.A. §§ 29-101 - 110; the rights and duties of attorneys, T.C.A. §§ 29-201 - 204; and unauthorized practice and improper conduct, T.C.A. §§ 29-301 - 312. These sections include provisions for court assignment of counsel for paupers, permission for any party to conduct his own case, prohibitions upon the unlawful practice of law, and penalties for falsely representing oneself as an attorney. Petitioner does not allege that he has complied with any of these laws, despite the fact that his activities clearly constitute unlawful practice in Tennessee[2].

In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary. (There seems to be little question that petitioner, a convicted felon, could ever obtain a license to practice in state or Federal Courts even if he had the required legal education, which he does not have.)

The main thrust of the District Court's opinion on this issue

[2] T.C.A. § 29-302 defines the practice of law in Tennessee as follows:

"The 'practice of law' is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents, or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies."

viction proceedings. Indeed, we believe that no favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims.

We do not agree with the District Court that "[b]y preparing petitions for other prisoners, the petitioner is certainly acting in their behalf." Neither the language nor the policy of 28 U.S.C. § 2242 justifies such a conclusion.

The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers. See *United States* v. *Houston*, 273 Fed. 915 (2d Cir. 1921).

The problem of providing effective access to legal assistance at all stages of criminal justice, from pre-trial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court.

Reversed.

STATE OF TENNESSEE EX REL
JAMES E. DAWSON

V.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY

DAVIDSON CRIMINAL

Hon. John L. Draper, Judge.

For Plaintiff in Error:

John J. Archer
Nashville, Tennessee

For the State:

Paul E. Jennings
Assistant Attorney General

O P I N I O N

This is another of the many, many petitions for the writ of habeas corpus such as we have had in recent years. The main contention here is whether or not the trial court erred in failing to grant the petitioner an evidentiary hearing on allegations set forth in his petition. The allegations are the usual twelve contentions presented in these many petitions.

Dawson was convicted on May 11, 1965, for the offense of robbery with a deadly weapon and was sentenced to twenty-five (25) years in the penitentiary. He is now in the State penitentiary. His petition was thus prepared by the writ-writer in the penitentiary and filed in the Circuit Court of Davidson County and was transferred pursuant to statute by the Chief Justice to one of the Criminal Courts of that county.

The petitioner alleges that: (1) the trial court was without authority to indict, try, convict and sentence him because the Legislature which defined the offense was malapportioned; (2) he was arrested without a warrant; (3) he was not furnished a copy of the warrant which was sworn against him; (4) he was not represented by counsel at his preliminary hearing; (5) he was not furnished a copy of the panel of grand jurors; (6) he was not furnished a copy of the panel of the petit jurors; (7) he was indicted, tried and convicted by juries composed solely of white persons in violation of his constitutional rights and was not informed of his right to have Negroes on his jury; (8) he was tried and convicted by a jury which was improperly selected in that the names of the petit jurors were not picked from a jury box by a blindfolded person; (9) he was not furnished a copy of the statement of one of his co-defendants, said statement allegedly implicating him; (10) there is no evidence to support the verdict of the jury; (11) there was no corpus delicti established; and (12) the sentence imposed was so excessive as to show prejudice, passion and caprice on the part of the trial jury and said sentence constitutes cruel and unusual punishment against the petitioner.

As said in the outset hereof the Criminal Judge denied this petition without an evidentiary hearing and made a written finding and statement of why he did so. This statement,

or Order of the Criminal Judge, does not directly controvert or dispose of the allegations of the petitioner, and the denial of the hearing on these matters and refusal to appoint counsel effectively precluded petitioner from introducing evidence to prove their truth. These statements of the Criminal Judge are statements made of his own knowledge, but as far as this record is concerned are not supported by evidence, and it is necessary in a number of the issues that said statements which are known to the trial judge be supported by evidence to meet certain of the requirements of a number of Federal cases. Therefore, it seems to us that at least on one of the issues alleged by the petitioner, hereinafter pointed out, that it is necessary that this case be remanded for an evidentiary hearing.

The allegations of this petitioner, 1, 2, 3, 5, 6 and 8 were dealt with by this Court in the opinion of State ex rel Callahan v. Henderson, ___ S.W.2d ___, released for publication on July 28, 1967.

Allegation number (4) that the petitioner was not represented by counsel at his preliminary hearing, has frequently been dealt with by this Court, and we have held that such proceedings are not critical in this State when the petitioner does not act to his prejudice, such as entering a plea of guilty. State ex rel Carlson v. State, ___ Tenn. ___, 407 S.W.2d 165, 169.

Petitioner's allegation number (7) alleges that Negroes were systematically excluded from his juries. There is no evidence in this record other than this allegation and the statement by the trial judge that this is without merit "since the Court knows and finds that both the grand jury and petit jury had, both before, at the time, and since his trial contained the names of Negroes as well as white people." This statement though alone, without showing how this was done by an evidentiary hearing and giving this petitioner a chance to show these things, is not sufficient. A defendant is not constitutionally entitled to demand a proportionate number of his race on the jury. State ex rel Smith v. Johnson, ___ Tenn. ___, 413 S.W.2d 694; Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759. The allegations in this petition merely allege that no Negroes were included on the juries and this fact is contradicted by the statement of the trial judge who knows what was done in this particular case and was done in other similar cases in his court. We think though the statement of the trial judge is insufficient with regard to this allegation, and consequently under the authority of Reed v. Heer, ___ Tenn. ___, 403 S.W.2d 310, this cause must be remanded for an evidentiary hearing.

The ninth allegation was to the effect that the petitioner had not been furnished a copy of the statement of his co-defendant which implicated the petitioner. The record shows

that the petitioner entered a plea of guilty to the offense and further does not allege that the statement was introduced against him. It is therefore our finding under such allegations, as it was by the trial judge, that the petitioner suffered no prejudice in this regard.

The petitioner's allegations numbers (10) and (11) contending there was an insufficiency of evidence to convict him is not a matter which is reversible by a writ of habeas corpus. Fernandez v. Klinger, 346 F.2d 210, certiorari denied 382 U.S. 152.

The allegations contained in number (12) certainly cannot be raised in a petition of this kind because the punishment as meted out by the jury does not show that it is anything unusual and it is well within the statute for such crime, and such punishment cannot be attacked as cruel and unusual. See Hardin v. State 210 Tenn. 116, 355 S.W.2d 105, where this Court held that the provisions of Article I, Section 16 of the Constitution of the State of Tennessee are not violated as long as the punishment is within the statutory provisions. The Federal Courts apply this rule. Harris v. Stephens, 361 F.2d 888.

Because we think there should be an evidentiary hearing on the question of the exclusion as above set forth,

the cause is remanded to the Criminal Court of Davidson County for that purpose with the request that Mr. Archer, who represented the petitioner herein by appointment, remain as his counsel. We extend our appreciation to Mr. Archer for what he has done and what he will do in the future, and he can get compensation by filing a petition with the Executive Secretary for the Supreme Court.

Per Curiam.

Office of CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the OPINION *of said Court, pronounced at its December term, 19* 66, *in case of* STATE, EX REL., JAMES E. DAWSON *against* C. MURRAY HENDERSON, WARDEN, ETC. *as appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 31st *day of* October, *19* 67

Ramsey Leathers, *Clerk*

By _____, *Deputy Clerk*

IN THE FIFTH CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE

FILED

FEB 8 1967

HAWKINS, Clerk

D. C.

OF TENNESSEE)
)
)
AMES DAWSON .)

ARMED ROBBERY

#11647

FILED

DEC 7 1966

ALF. RUTHERFORD, Clerk

D. McNeil Deputy

A-1649

MOTION TO INVALIDATE THE CONVICTION AND JUDGMENT OF TWENTY-FIVE (25) YEARS IN THE TENNESSEE STATE PENITENTIARY, AT NASHVILLE, TENNESSEE, FOR THE CRIME OF ARMED ROBBERY. ON BEHALF OF THE DEFENDANT, JAMES DAWSON.

TO THE HONORABLE SAM L. FELTS, JR., PRESIDING JUDGE OF THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE:

MAY IT PLEASE THE HONORABLE COURT:

Comes now, the defendant, James Dawson, in his own proper person, in the above styled cause, and hereby respectfully moves the Honorable Court to invalidate the conviction, and judgment of twenty-five (25) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of Armed Robbery, which were imposed against him illegally and unlawfully by the Division Two, Criminal Court of Davidson County Tennessee, in May, 1965, despite his plead of not guilty before a trial jury, along with two (2) co-defendants thereof, on the following grounds:

I

Because the Division Two, Criminal Court of Davidson County, Tennessee, was without juridiction to indict, try, convict, and sentence the defendant to the term of twenty-five (2 5) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of armed robbery, because the Statute (Tennessee Code Annotated, Section 39-3901) which describing the offense, and punishment for the said crime of Armed Robbery, is invalid, unconstitutional, and ex post facto, because the legislatures which enacted and re-enacted it were improperly apportioned in violation of the Fourteenth Amendment to the Constitution of the United States, as a result of Tennessee's failure to adequately reapportion the legislative seats, and districts of the State of Tennessee since 1901, although required to do so, every ten (10) under Article II, Sections 4, 5, and 6 of the Constitution of the State of the State of Tennessee, so as to continually to provide equal representation

very citizen of the State of Tennessee. (See the Reappor-
of Baker V. Carr, 179 F. Supp. 824 (1959) cert. Granted, 364
(1960), 179 F. Supp. 828; Baker V. Carr, 364 U.S. 889; Baker V.
66 U.S. 907; Baker V. Carr, 369 U.S. 186 (1962). 200.)

II

Because the defendant was arrested at his home in Mount Pleasant, Tennessee, on February, 22, 1965, by officers thereof, without a warrant authorizing them to do so, in violations of Tennessee law, Article I, Declaration of Rights, Sections 7 and 8 of the Constitution of the State of Tennessee, and the Fourth and Fourteenth Amendments to the Constitution of the United States, taken to the city hall in said Mount Pleasant, Tennessee, interrogated, and thereafter, taken to the Davidson County Jail, in Nashville, Tennessee, where he was again, interrogated, and therewith, charged with the crime of armed robbery, despite his denial of it thereof.

III

Because the defendant was not furnished a copy of the warrant that was sworn out against him by his accuser, and therewith, issued by the General Sessions Judge of the General Sessions Court of Davidson County, at Nashville, Tennessee, charging him therein, with the crime of armed robbery, as required under Tennessee law, for the preparation and filing of a defense thereto, or advised by anyone as to his rights to be furnished a copy of the said warrant of armed robbery, although he was ignorant of law, and did not know that he was entitled to be furnished a copy of the said warrant of armed robbery.

IV

Because the defendant was not represented by a lawyer at his preliminary hearing in the General Sessions Court of Davidson County, at Nashville, Tennessee, in respect to the charge of armed robbery, as required in all criminal proceedings under the provisions of Tennessee Code Annotated, Sections 40-2001 - 40-2002 - 40-2003, Article I, Declaration of Rights, Section 9 of the Constitution of the State of Tennessee and the Sixth, and Fourteenth Amendments to the Constitution of the United States, for the preparation and filing of a defense thereto, or advised by the General Sessions Judge thereof, as to his rights to be represented by a lawyer appointed by the court, or employed by his own means at the said preliminary hearing, although the defendant was poverty, ignorant of law, did not know that he was entitled to be represented by a lawyer, did not know how to challenge the legality of the charge set forth in the warrant, or prepare and file a defense thereto,

to challenge the legality of the state evidence to deter-
ther or not it was good or bad, pleaded not guilty to the
, and was thereupon, bounded over to the State for the action of
Jury. The defendant [illegible], Your Honor, that his said preliminary
in the said General Sessions Court of Davidson County, at Nashville,
ssee, was a critical stage of the proceedings against him, and there-
ore, he certainly needed the assistance of a lawyer, because that happened
to him thereof, affected his whole preliminary hearing, indictment, and
trial proceedings, and thereby, resulted into his conviction, and judgment
of twenty-five (25) years in the Tennessee State Penitentiary, at Nashville,
Tennessee, for the said crime of armed robbery.

V

Because the defendant was not furnished a copy of the panel of Grand Jury before his trial proceedings, in the Division Two, Criminal Court of Davidson County, Tennessee, as required in all criminal cases under Tennessee law, for the preparation and filing of a plea in abatement to the indictment or incompetency of Grand Jurors, or advised by anyone as to his right to be furnished a copy of the said panel of Grand Jury, although he was ignorant of law, accused of committing a serious crime, and did not know that he was entitled to be furnished a copy of the said panel of Grand jury.

The defendant is entitled to a copy of the panel of Grand Jury, so that he may file a plea in abatement to the indictment for incompetency of Grand Jurors. Bennett V. State (1827), 8 Tenn. 133.

VI

Because the defendant was not furnished a list of the petit jurors that were summoned to hear and determine his case of armed robbery before his trial proceedings in the Division Two, Criminal Court of Davidson County, Tennessee, as required in all criminal cases under Tennessee Code Annotated , Section 40-2505, or advised by anyone as to his rights to be furnished a list of the said Petit Jurors, although he was ignorant of law, accused of committing a serious crime, and did not know that he was entitled to be furnished a list of the said Petit Jurors.

A prisoner standing mute is entitled to the Panel or list of jurors summoned. Link V. State (1871), 50 Tenn. 252.

VII

Because the defendant was indicted, tried, and convicted by juries composed solely of white persons in direct violation of the due process and e-

...ion clauses of Article I, Declaration of Rights, Section 8 of ...ution of the State of Tennessee, and the Fourteenth Amendment to ...stitution of the United States, because no negroes were selected to ... thereof, although he was a Negro, accused of committing a capital case, ... the victim in the case was a white person. Moreover, Your Honor, the defendant was not advised by the trial court, of his counsel as to his rights to have Negroes as well as white persons to serve on the Grand and Petit Juries of his case of armed robbery, and if he had been advised of his constitutional rights to have Negroes and white persons to serve on the said Grand and Petit Juries, he certainly would have requested the trial court, and his counsel to do so.

Your Honor, congress has expressly forbidden the exclusion of any citizen form services as a grand or petit juror in any state court, on the ground of race or color, Sec. 5, 14th Amendment, 18 Statutes 336, Title 8, U.S.C.A., Sec. 44.

In 1880, the Supreme Court of the United States, in Strauder V. West Virginia, 100 U.S. 303, one of the first cases applying the Fourteenth Amendment to racial discrimination, held that under the equal protection clause, a state cannot systematically exclude persons from juries solely because of their race or color. Since Strauder and until today the said Supreme Court of the United States, has consistently applied this constitutional principle. See Ex parte Virginia, 100 U.S. 339; Neal V. Delaware, 103 U.S. 370; Gibson V. Mississippi, 162 U.S. 565; Carter V. Texas, 177 U.S. 442; Rogers V. Alabama, 192 U.S. 226; Martin V. Texas, 200 U.S. 316; Norris V. Alabama, 294 U.S. 587; Hale V. Kentucky, 303 U.S. 613; Pierre V. Louisiana, 306 U.S. 354; Smith V. Texas, 311 U.S. 128; Hill V. Texas, 316 U.S. 400; Akins V. Texas, 325 U.S. 398; Patton V. Mississippi, 332 U.S. 463; Cassell V. Texas, 339 U.S. 282; Hernandex V. Texas, 347 U.S. 475; Reece V. Georgia, 350 U.S. 85; Eubanks V. Louisiana, 356 U.S. 585; Arnold V. North Carolina, 376 U.S. 773.

The rationale upon which these decisions rest was clearly stated in Norris V. Alabama, Supra, at 589:

"There is no controversy as to the constitutional principle involved, ... summing up precisely the effect of earlier decisions, the Supreme Court thus stated the principle in Carter V. Texas, 177 U.S. 442, 447, in relation to exclusion from service on grand juries: "Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors

...ws is denied to him, contrary to the Fourteenth Amendment ...tion of the United States. Strauder V. West Virginia, 100 ...el V. Delaware, 103 U.S. 370, 397; Gibson V. Mississippi, 162 ... This statement was repeated in the same terms in Rogers V. Ala... 192 U.S. 226, 231, and again in Martin V. Texas, 200 U.S. 316, 319. ...principle is equally applicable to a similar exclusion of Negroes from ...vice on petit juries. Strauder V. West Virginia, Supra, Martin V. Texas, Supra. And although the State Statute defining the qualification of jurors may be fair on its face the constitutional provisions affords protection against action of the state through its administrative officers in effecting the prohibited discrimination. Neal V. Delaware, Supra: Carter V. Texas, Supra. Compare Virginia V. Rives, 100 U.S. 313, 322, 323; in re Wood, 140 U.S. 278, 285; Thomas V. Texas, 212 U.S. 278, 282, 283."

This set of principles was recently and explicitly reaffirmed by the said Supreme Court of the United States, in Eubanks V. Louisiana, Supra, and Arnold V. North Carolina, Supra.

The reasons underlying the court's decisions in these cases were well expressed in Strauder:

"The very idea of a jury is a body of men composed of the peers or equals of the person who rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter. It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called packing juries. It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." 100.U.S., at 308-309.

Moreover, (t) he very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and maybe in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the

...al justice which the law aims to secure to all others. 100.
...03.

...principles and reasoning upon which this long line of decisions ...ere sound. The need for their reaffirmation is present. The United ...Commission of Civil Rights in it's 1961 report, Justice, 103, after ex... ...ustive study of the practice of discrimination in jury selection, concluded that (t)he practice of racial exclusion from juries persists today even though it has long stood indicted as a serious violation of the Fourteenth Amendment. "It is unthinkable, therefore, that the principles of Strauder and the cases following should be in any way weakened or undermined at this late date particularly when the Supreme Court of the United States has made it clear in other areas, where the course of decision has not been so inform, that the States may not discriminate on the basis of race. Compare Plessy V. Ferguson, 163 U.S. 537, with Brown V. Board of Education, 347 U.S. 483; Compace V. Alabama, 106 U.S. 583, with McLaughlin V. Florida, 309 U.S.____.

"Though the law itself be fair on its face and impartial in appearance, yet, it it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. Yick Wo VS. Hopkins, 118 U.S. 356, (1885).

VIII

Because the defendant was tried, and convicted by a trial jury which itself was illegally and unlawfully constituted in direct violations of his constitutional rights to a fair and impartial trial by an impartial jury of his peers, as guaranteed to him under the provisions of Article I, Declaration of rights, Sections 8 and 9 of the Constitution of the State of Tennessee, and the Sixth, and Fourteenth Amendments to the Constitution of the United States, because the names of the petit jurors were not picked from a jury-box or other receptacle by a blindfolded person, as required in all criminal cases under Tennessee. For a full review, and discussion on the issue of the selections of juries, see Text Books, History of a lawsuit (7th ed., Gilpath), 739; 31 Am. Jur., Jury, 60; ... C.J.S., Juries, 182.

A party may raise for the first time, after trial, any irregularity in the selection of a jury, if knowledge thereof, becomes known to him after trial. McCormack V. McNamee, Mol, 274 S.W. 2d 272, 10 C. Cit. 275 (4,5); ---Sho-Me Power Corp. V. Fann, 292 S.W. 2d 91.

IX

the defendant was not furnished a copy of the statement of One co-defendant's, implicating the defendant in the crime of armed , before his trial proceedings in the Division Two, criminal Court vidson County, Tennessee, for the challenging of the legality of it roof, as required in all criminal cases under T.C.A., Section 40-2441. Moreover, he was not present at the time the said statement was given to the officers of the Nashville Police Dep ment, by his said co-defendant, implicating the defendant in the crime of armed robbery.

X

Because there was no competent evidence to support the verdict of guilty returned by the trial jury against the defendant for the crime of armed robbery, whereas, the only evidence that connected the defendant with the crime of armed robbery was a null and void statement of one (1) of his co-defendants. (See the court reporter's Transcript of the defendant's proceedings)

XI

Because there was no corpus delicti. (See the court reporter's Transcript of the defendant's trial proceedings of armed robbery in the office of the Clerk of the Criminal Courts of Davidson County, Tennessee.)

XII

Because the sentence of twenty-five (25) years imprisonment imposed by the verdict of the trial jury against the defendant, for the crime of armed robbery in the Division Two, Criminal Court of Davidson County, Tennessee, was so excessive as to show prejudice passion, and caprice upon the part of the said thial jury. Moreover, the said sentence of twenty-five (25) years imprisonment imposed by the verdict of the said trial jury, for the said crime of armed robbery, constitutes cruel and unusual punishment upon the defendant in direct violation of Article I, Declaration of Rights, section 16 of the Constitution of the State of Tennessee, and the Eight Amendment to the Constitution of the United States, because it (the sentence of twenty-five (25) years imprisonment) has no parole date under Tennessee law, and the State of Tennessee, Division of pardons, paroles & probation.

The defendant avers, Your Honor, that as a result of the above said illegal process, as complained hereof, he has been denied, and deprived of his liberty without due process and equal protection of laws in direct violation of Article I, Declaration of Rights, Section 8 of the Constitution of the

Tennessee, and the Fifth, and Fourteenth Amendments to the Constitution of the United States, and therefore, he is duly entitled to an invalidation of his conviction, and judgment of twenty-five (25) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of armed robber, by a court of law, as a matter of due process of law.

State Courts, equally with Federal Courts, are under an obligation to guard and enforce every right secured by the Federal Constitution, Constitution of the United States, Article VI, Clause 2; Smith V. O'Grady, Supra; Palmer V. Ashe, 324 U.S. 135.

The Supreme Court of the United States is the final arbitor of questions involving the contract, restrospective law, due process and equal protection provisions contained in both the state and Federal Constitutions so that all decisions of such court with reference to such questions are controlling. Paine V. Fox (1938), 172 Tenn. 290, 112 S.W. (2d) 1; Martin V. Huntor's Lessee, 1 Wheat. 304, 4 L. Ed. 97 (1816).

The defendant further avers, Your Honor, that the legality of his detention and restraint has not been determined by a court of the State of Tennessee, on a previously motion to invalidate the conviction, and judgment in his case of armed robbery, upon the allegations set forth in his said motion hereof, and this is the first application for a motion to invalidate the conviction, and judgment of armed robbery, that's ever been filed by the defendant in a court of the State of Tennessee, upon the allegations set forth hereof, although a previously petition for writ of habeas corpus was denied by the Division Two, Criminal Court of Davidson County, Tennessee, in 1966, but no appeal was prosecuted to the State Supreme Court, due to the fact that the said petition for writ of habeas corpus, was not adequately prepared, and premature. Moreover, the defendant avers, Yours Honor, that he was unable to attach to this motion hereof, as exhibits thereto, the certified copy of the arrest warrant, the certified copy of the minutes of the preliminary hearing, the certified copy of the indictment, the certified copy of the verdict-judgment, and the certified copy of the court reporter's transcript of the trial proceedings of armed robbery, which were had in the Division Two, Criminal Court of Davidson County, Tennessee, and the certified copy of the previously petition for writ of habeas corpus, because he was unable to pay the Clerk of the Criminal Court of Davidson County, Tennessee, the necessary fee for the said records of his case, due to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, but

...erely believes that he is entitled to prosecute his motion hereof, ...matter of due process of law. Therefore, Your Honor, this said Hon...able Court hereof, should an fairness on behalf of the defendant's case, take judicial notice of the person of the defendant, the subject matter, and therewith, grant him the relief sought, as a matter of due process of law.

PREMISES CONSIDERED, YOUR HONOR, the defendant, James Dawson, respectfully prays the Honorable Court:

I

To invalidate the conviction, and judgment of twenty-five (25) years in the Tennessee State Penitentiary at Nashville, Tennessee, for the crime of armed robbery, in the above styled cause, and therewith, order the Warden of the Tennessee State Penitentiary, at Nashville, Tennessee, to release the defendant from custody thereof, as a matter of due process of law.

II

To appoint the Honorable Robert L. Jackson, and the Honorable John C. Tune, Jr., of the Tennessee Bar Association, to make a thoroughly investigation of the defendant's case, prepare, and file a memorandum, or an amended motion in further support of the defendant's motion hereof, and therewith, represent the defendant before the Bar of this Honorable Court, without cost to him, due to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, as a matter of due process of law.

III

To subpoena the arresting officers in the defendant's case; the victim in the defendant's case of armed robbery, the General Sessions Judge of the General Sessions Court of Davidson County, at Nashville, Tennessee, who presided over the defendant's warrant, and preliminary hearing; the Honorable John L. Draper, presiding Judge of the Division Two, Criminal Court of Davidson County, Tennessee, who presided over the defendant's indictment, arraignment, trial, conviction, and judgment; the prosecuting attorney, who prosecuted the defendant on behalf of the state; the former public defender (Mr. James Tyre Harvon) of Davidson County, Tennessee, who represented the defendant in the case; the members of the Grand Jury; the members of the trial jury; the jury commissioner of Davidson County, Tennessee; the Clerk of the Criminal Court of Davidson County, Tennessee; and the defendant's co-defendants, for the evidentiary hearing of this motion hereof, without cost to the defendant, due to his poverty, and confinement in the Tennessee State

itentiary, at Nashville, Tennessee, as a matter of due process of law. Moreover, subpoena the certified copy of the arrest warrant, the certified copy of the minutes of the preliminary hearing, the certified copy of the verdict-judgment, the certified copy of the court reporter's transcript of the defendant's trial proceedings of armed robbery, the certified copy of the defendant's co-defendant statement, and the certified copy of the defendant's previously petition for writ of habeas corpus, from the office of the Clerk of the Criminal Court of Davidson County, Tennessee, for the evidentiary hearing of this motion hereof, as a matter of due process of law.

IV

To grant the defendant an evidentiary hearing in person before the Bar of the Fifth Circuit Court of Davidson County, Tennessee, within ten (10) days, in respect to the allegations set forth in his motion hereof, due to the nature of the case, and his confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, as a matter of due process of law.

Respectfully submitted,

/s/ William Lee Johnson, #55149,
William Lee Johnson, #55149,
writ writer, on behalf of the defendant, James Dawson, Tennessee State Penitentiary, at Nashville, Tennessee.

/s/ James Dawson
JAMES DAWSON, Defendant

16

APPENDIX C 37
APPENDIX E 38

AFFIDAVIT OF BEHALF OF JAMES DAWSON

James Dawson, being first duly sworn, makes oath that he is a citizens of the United States of America, and a resident of the State of Tennessee, that the foregoing motion to invalidate the conviction, and judgment of Twenty-five (25) years in the Tennessee State Penitentiary, at Nashville, Tennessee, for the crime of armed robbery, on his behalf, has been prepared, and read to him, by a writ writer, (William Joe Johnson, #53149, Tennessee State Penitentiary, at Nashville, Tennessee), without cost to him, due to his (James Dawson) ignorance of the law as to how to prepare and file the necessary papers on his own behalf, and that he is familiar with the contents therein and the same are true to the best of his knowledge, information, and belief and that he institutes this legal action in good faith, and believing himself duly entitled to the redress sought. Further, defendant makes oath that owing to his poverty, and confinement in the Tennessee State Penitentiary, at Nashville, Tennessee, he is unable to bear the cost of this motion, but is justly entitled to the redress sought, as a matter of due process of law.

/s/ James Dawson
JAMES DAWSON, Affiant

Sworn to and subscribed before me on this 2 th day of December, 1966.

(Seal) /s/ James H Fox
NOTARY PUBLIC

My commission expires on the 24 the day of JAN 1970.

Office of CLERK OF THE SUPREME COURT
FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, RAMSEY LEATHERS, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the PETITION FOR WRIT OF HABEAS CORPUS FROM THE TRANSCRIPT OF THE FIFTH CIRCUIT COURT OF DAVIDSON COUNTY, TENNESSEE *of said Court, pronounced at its December term, 19----, in case of* STATE OF TENNESSEE, ex rel. JAMES DAWSON *against* C. MURRAY HENDERSON, WARDEN *as appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 3rd *day of* November, *19* 67

Ramsey Leathers, *Clerk*

By _____, *Deputy Clerk*

11-66 IM HESSEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. ~~902 MISC.~~ ~~1195~~ 40

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, COMMISSIONER, DEPARTMENT OF CORRECTION, and C. MURRAY HENDERSON, WARDEN, TENNESSEE STATE PENITENTIARY, NASHVILLE, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

GEORGE F. McCANLESS,
Attorney General & Reporter,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
Supreme Court Building,
Nashville, Tennessee,

DAVID W. McMACKIN,
Assistant Attorney General,
Supreme Court Building,
Nashville, Tennessee 37219.

Attorneys for Respondents.

INDEX

CITATIONS

STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 902 MISC.

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, COMMISSIONER, DEPARTMENT OF CORRECTION, and C. MURRAY HENDERSON, WARDEN, TENNESSEE STATE PENITENTIARY, NASHVILLE, TENNESSEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (App. B13 of Petition) is reported at 252 F.Supp. 783 (1966). The opinion of the United States Court of Appeals for the Sixth Circuit (App. B18 of Petition) is reported at 382 F.2d 353 (1967).

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED.

(1) Does the Tennessee prison regulation in question conflict with 28 U.S.C. § 2242?

(2) Does the enforcement of this regulation deny or unduly restrict reasonable access to the courts?

STATUTE AND REGULATION INVOLVED.

28 U.S.C. § 2242 is set forth in Appendix A of the petition. The challenged regulation is as follows:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practioners for the purpose of promoting a business of writing Writs." Guidance Manual for Prisoners, Sec. VI, page 7.

STATEMENT.

The petitioner, William Joe Johnson, is an inmate of the Tennessee State Penitentiary pursuant to a 1959 judgment of

conviction for the offense of rape. Respondent Harry S. Avery is the duly appointed and qualified Commissioner of Correction of the State of Tennessee in charge of all State penal institutions, reformatories and penitentiaries. Respondent C. Murray Henderson is the duly qualified Warden of the Tennessee State Penitentiary at Nashville.

At the outset, it must be noted that the petitioner is not complaining that he has been denied access to the courts. To the contrary, the petitioner has filed numerous petitions for writs of habeas corpus in his own behalf. See State ex rel. Johnson v. Heer, ___ Tenn. ___, 412 S.W.2d 218 (1966). His latest Federal habeas corpus petition was denied by the Honorable Robert L. Taylor, Chief Judge of the United States District Court for the Eastern District of Tennessee in the case of In Re Johnson, Civil No. 6097 (decided October 31, 1967). The Memorandum and Order entered in that case is attached hereto as respondents' Appendix A. More recently, the petitioner has filed a 42 U.S.C. § 1983 complaint in the United States District Court for the Middle District of Tennessee seeking damages in the amount of One Hundred Thousand ($100,000.00) Dollars. He contends that he has been damaged for the above amount due to the enforcement of the regulation being challenged in the instant case. Johnson v. Avery, Civil No. 4939 (filed December 18, 1967).

The petitioner, William Joe Johnson, frankly admits that he has repeatedly and knowingly violated the regulation in question and candidly states his intention to continue to do so. He holds

himself out as being an indispensable person to render legal assistance and service to fellow inmates who allegedly need his experience, wisdom and legal knowledge in the preparation of their petitions for writs of habeas corpu.

ARGUMENT.

I.

The District Court held that the regulation prohibiting any inmate from advising or assisting other prisoners in the preparation or filing of writs of habeas corpus or other legal papers conflicted with 28 U.S.C. § 2242 and was accordingly void. The Court below reversed:

> "We do not agree with the District Court that '/b/y preparing petitions for other prisoners, the petitioner is certainly acting in their behalf.' Neither the language nor the policy of 28 U.S.C. § 2242 justifies such a conclusion.
>
> "The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers." 382 F.2d at 357.

Respondents are not asking the Court to look to form or technical niceties regarding applications for habeas relief filed by prison inmates pro se. Tennessee has recently passed a Post Conviction Procedure Act in an effort to simplify the procedure and expedite the disposition of the literally hundreds of petitions which are being filed in this State. This Act is codified in T.C.A. 40-3801 through 40-3819 and same is attached hereto as respondents' Appendix B. All that is required is a simple statement of fact alleging a deprivation of a constitutional right. Legal citations are neither required nor desired.[1/] The petitioner does not contend that the prisoners he represents are incapable of signing or verifying their petitions due to physical or mental handicaps nor does he insist that these inmates, due to some defect, are wholly incapable of preparing their own petitions but rather alludes to his superior knowledge

---

1/ 40-3807. Amendment of petitions not in prescribed form.--No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition.

40-3815. Dismissal, withdrawal or amendment of petitions.--The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments.

40-3821. Determination of indigency--Appointment of counsel and court reporters.--Indigency shall be determined and counsel, and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014--40-2043.

and skill in preparing same, a self-imposed distinction which has proven to have little if any basis in fact. In other words, he simply claims that he is an expert in this field and is eminently qualified to represent fellow prisoners in their habeas applications.

Respondents respectfully submit that the Court below correctly held that neither the language nor the policy of 28 U.S.C. § 2242 authorizes the petitioner to set himself up as a "jail house lawyer" without restraint or reservation in the wholesale preparation of petitions for writs of habeas corpus for other inmates of the state penitentiary. Gusman v. Marrero, 180 U.S. 81 (1901); United States v. Houston, 273 F. 915 (2nd Cir. 1921); and Wilson v. Dixon, 256 F.2d 536 (9th Cir. 1958), cert. denied 358 U.S. 856.

II.

The fundamental right in issue here is that of reasonable access to the courts. A denial or undue restriction of this right is a denial of due process guaranteed to State prison inmates by the Fourteenth Amendment. White v. Ragen, 324 U.S. 760 (1945); Cochran v. Kansas, 316 U.S. 255 (1942); and Ex Parte Hull, 312 U.S. 546 (1941). A cursory examination of both the State and Federal dockets conclusively reveals that this right is not being impeded in Tennessee. Petitioner's allegations in this regard are general and conclusory, having no factual support.

Proper State officials have unquestionably been authorized to adopt, promulgate and enforce rules and regulations with reference to the internal management and discipline of prison inmates. The Court below noted "the well-established reluctance of the Federal Courts to intervene in internal affairs of State or Federal penal institutions . . . . unless it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the Constitution." (Cases cited). 382 F.2d at 355. Respondents respectfully submit that the right to practice law[2/] or to maintain a legal office, school or department within the confines of the state penitentiary is not a right secured by the Constitution of the United States. Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961); cert. denied, 368 U.S. 862; Siegel v. Ragen, 180 F.2d 785 (7th Cir. 1950), cert. denied 339 U.S. 990; Roberts v. Peppersack, 256 F.Supp. 415 (D.C. Md. 1966); Ex Parte Wilson, 242 F.Supp. 537 (E.D.J.C. 1965); Edmundson v. Harris, 239 F.Supp. 359 (W.D. Mo. 1965); and Austin v. Harris, 226 F.Supp. 304 (W.D. Mo. 1964).

Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system.

2/ 29-302. Definition of practice and business.--The "practice of law" is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

Price v. Johnson, 334 U.S. 266 (1948). Conversely, petitioner maintains that he has acquired, by virtue of his conviction and subsequent imprisonment, a constitutional right to practice law which he clearly would not have were he merely a private lay citizen.

> "In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary. (There seems to be little question that petitioner, a convicted felon, could ever obtain a license to practice in state or Federal Courts even if he had the required legal education, which he does not have.)" 382 F.2d at 356.

All penal institutions attempt to avoid the development of inmate leaders. Once such leadership is established, the aggressive and strong inmates exploit and dominate the weaker prisoners. This is the exact situation we are faced with here. The objection to the petitioner's activities is based upon the disastrous effect it has on prison discipline and morale.

> "Yet in none of those cases did the Court indicate that these rights could be protected through representation by a layman. To the contrary, the Court has consistently emphasized that it is representation by trained counsel which is necessary to take advantage of the full scope of an accused's rights and shield him from unfair tactics or his own ignorance.
>
> "We agree with this approach to the problem of effectuating Constitutional rights both as to pre-trial events and post-conviction proceedings. Indeed, we believe that no favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions

> of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims." 382 F.2d at 356, 357.

The staff of the Attorney General's Office is well familiar with Johnson petitions. The petitioner alleges substantially the same grounds in every petition, the allegations generally ranging in number from eight (8) to twelve (12); e.g., compare Dawson v. Henderson (Appendix C22 of petition) with In Re Johnson (Appendix A1 of Response). Respondents want it to be clear that the regulation in question was not adopted in an attempt to reduce the number of habeas petitions. Nor do the "Johnson allegations" present any additional or extra difficulty. To the contrary, petitioner's allegations have been litigated to such an extent that the great majority of them can be and are resolved as a matter of law.

It is therefore respectfully submitted that the Court below properly concluded as follows:

> "The problem of providing effective access to legal assistance at all stages of criminal justice, from pre-trial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the ad hoc procedures sanctioned in the District Court.
>
> "Reversed." 382 F.2d at 357.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the challenged prison regulation does not conflict with 28 U.S.C. § 2242 and that the enforcement of this regulation does not deny or unduly restrict reasonable access to the courts. It is accordingly submitted that this petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

GEORGE F. McCANLESS,
Attorney General & Reporter,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

DAVID W. McMACKIN,
Assistant Attorney General,
State of Tennessee.

CERTIFICATE OF SERVICE.

I certify that I have mailed copies of the foregoing Brief for Respondents in Opposition to Pierce Winningham, III, Esq., Attorney at Law, Third National Bank Building, Nashville, Tennessee; Professor Carl P. Warden, Vanderbilt Law School, Nashville, Tennessee; and Professor Bruce E. Gagnon, Vanderbilt Law School, Nashville, Tennessee, by First Class Mail on this the 4th day of January, 1968.

David W. McMackin

DAVID W. McMACKIN,
Assistant Attorney General,
State of Tennessee.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

The original record was filed on
entered and docketed OCT 31 1967

IN RE:

WILLIAM JOE JOHNSON, CIVIL ACTION NO. 6097

Petitioner

MEMORANDUM AND ORDER

Before the Court for consideration is William Joe Johnson's motion for writ of habeas corpus.

A similar petition was before the Sixth Circuit Court of Appeals for Davidson County, Tennessee when an evidentiary hearing was held by Judge James M. Swiggart. The petition in that case recited that four previous petitions had been filed.

Following an evidentiary hearing in Nashville, the Court, after making findings of fact and conclusions of law with respect to each ground urged in support of the petition, dismissed it on the merits. The transcript of the testimony introduced at that hearing is made an exhibit to the answer in this case and has been carefully examined by the Court. The contentions made in that hearing are substantially the same as those made in the petition under consideration.

APPENDIX A

The first ground relied upon by petitioner as a basis for the writ is that he was arrested without a warrant. He testified that he did not see any warrant. The record was silent as to whether a warrant was issued. However, under Tennessee law, an arrest may be made without a warrant where a felony has been committed and there is reasonable cause for believing the person arrested to have committed it. TCA 40-803(3).

Petitioner was convicted in the State Court on a valid indictment returned by a grand jury and whether a warrant was issued by a sessions judge prior to his arrest would not be a violation of a constitutional right that would entitle him to relief in this case. McCord v. Henderson, Warden, C. A. 6, October 25, 1967.

The second ground is that petitione was interrogated by officials of Montgomery County following his arrest when his counsel was not present. It was not shown that petitioner made any admission at the time he was examined or that any evidence was used against him as a result of the interrogtion at his trial on the merits. It was not shown that he was deprived of any of his constitutional rights in this regard.

The decisions in Escobedo v. Illinois, 378 U. S. 478 (1964) and Miranda v. Arizona, 384 U. S. 436 (1966) would not apply to the present case. Johnson v. New Jersey, 384 U. S. 719 and Davis v. Kropp, 369 F. 2d 342.

The third ground is that defendant was denied due process because he was not furnished with a copy of the warrant charging him with the offense of rape or with a list of the persons summoned for the petit jury. He was represented by

three experienced and able attorneys but he does not charge that any request was made by them for these documents. Nor does he charge that he was not furnished with a copy of the indictment. The allegations under this ground are not sufficient under the circumstances shown in the record in this case to show a violation of a constitutional right.

The fourth ground is that petitioner was not confronted face to face with the accuser at the General Sessions Court hearing which bound him over for the action of the grand jury. The Tennessee constitution does not require a preliminary hearing. Dillard v. Bomar, 342 F. 2d 789 (C. A. 6); State ex rel Weston v. Henderson, Warden, 413 S. W. 2d 674. Tennessee law requires the committing magistrate to bind the accused to the grand jury when the grand jury is in session. No hearing is held unless the accused pleads guilty. TCA 40-402. Petitioner was confronted by witnesses at the preliminary hearing. This ground of the motion is without merit.

The fifth ground charges that the jury commissioners of Montgomery County intentionally and systematically excluded Negroes from the grand jury and petit jury which indicted and convicted him. The state trial judge found that this contention was not sustained by the proof. An examination shows that the findings of the state trial judge were supported by the record. Reams v. Davis, 333 F. 2d 430. There is no proof in the record that there was purposeful discrimination in the selection of jurors in Montgomery County. See Swain v. Alabama, 380 U. S. 202, 205.

The sixth ground asserts that petitioner was convicted pursuant to an invalid statute on the ground that the Legislatur that passed it was improperly apportioned. This question was

decided adversely to the contention of petitioner in the cases of Dawson v. Bomar, 322 F. 2d 445 and Horton v. Bomar, 335 F. 2d 583.

Petitioner also contends that the corpus delicti was not established. This involves a question of the evidence that was introduced in the trial on the merits. Habeas corpus is not the proper procedure to raise a question of evidence. Gemmel v. Buchkoe, 358 F. 2d 338 (C. A. 6).

The seventh ground is that petitioner was deprived of his right of appeal. Petitioner, as previously indicated, was represented by attorneys Hollinsworth, Looby and Williams. The record shows that these are qualified and experienced attorneys, two of them, Looby and Williams, have appeared in this Court and are recognized by this Court as experienced attorneys. Mr. Looby testified at the evidentiary hearing. He stated that he was privately employed and that he and his colleagues used their sound discretion in not appealing. Failure to appeal by private attorneys is not chargeable to the State as held by the State Supreme Court, State v. Heer, 412 S.W.2d 218, and as has been held by our Sixth Circuit Court of Appeals under the Fourteenth Amendment. The Supreme Court of Tennessee quoted the following language from a decision of the Sixth Circuit in the case of Davis v. Bomar, 344 F. 2d 84, as follows:

> "When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegiance is to his client whose interests are ordinarily diametrically opposed to those of the state. It necessarily follows that any lack of skill or incompetence of counsel must in these circumstances be imputed to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and as such are recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has

resulted adversely, have the judgment set aside because of the alleged incompetency, negligence or lack of skill of that counsel."

p. 220

The Court concludes that petitioner's failure to appeal does not entitle him to a writ of habeas corpus.

The eighth and final ground is that petitioner's constitutional rights were violated because Judge Spencer was not commissioned by the Governor pursuant to Section 17-222 T.C.A. This contention is without merit since state judges may interchange with each other by virtue of Section 17-207 T.C.A. Judge Spencer presided over the case at the request of Judge Hudson who was ill.

Having carefully considered petitioner's petition for writ of habeas corpus and each ground urged in its support and being of the opinion that it is lacking in merit, it is, therefore, ORDERED that the petition be, and same hereby is, denied.

See: Barker v. Ohio, 330 F. 2d 594; Crockett v. Haskins, 372 F. 2d 475.

Enter:

ROBT. L. TAYLOR

United States District Judge

APPENDIX B

Department of State

To all to whom these Presents shall come, Greeting:

I **Joe C. Carr** . *Secretary of State of the State of Tennessee, do hereby certify that the annexed is a true copy of*

House Bill No. 717

Chapter No. 310

Public Acts of 1967

the original of which is now on file and a matter of record in this office.

In Testimony Whereof. *I have hereunto subscribed my Official Signature and by order of the Governor affixed the Great Seal of the State of Tennessee at the Department in the City of Nashville, this* 29th *day of* May *A.D. 19*67.

THE GREAT SEAL OF THE STATE OF TENNESSEE · XVI · AGRICULTURE COMMERCE · 1796 ·

Secretary of State

APPENDIX B

PUBLIC CHAPTER NO. 316

HOUSE BILL NO. 717

By

Galbreath

AN ACT to establish post-conviction procedures and remedies, including proceedings for delayed appeal, in the nature of a writ of error in courts of this State for persons claiming a right to relief under the Constitution or laws of Tennessee or of the United States, and to repeal Sections 23-1840 through 23-1848 of the Code.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. A prisoner in custody under sentence of a court of this State may petition for post-conviction relief under this Act at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied.

SECTION 2. To begin proceedings under this Act, the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the State

SECTION 3. The petition shall briefly and clearly state:

1. Petitioner's full name and address;

2. The indictment number, if known, and the offenses for which the sentence was pronounced;

3. The name and location of the court which pronounced the sentence;

4. The date the sentence was pronounced;

5. The terms of the sentence;

6. What restraint of liberty is presently being imposed;

7. Who is imposing the present restraint, and when it commenced;

8. Any appeals and all other applications for relief previously filed including the date decided, the court, the grounds asserted and the result;

9. The names of the lawyers who have represented the petitioner and at what stage of the proceedings;

10. Facts establishing the grounds on which the claim for relief is based, whether they have been previously presented to any court and, if not, why not. If no prior petition under this Act has been filed, the petition shall set forth each of the individual grounds, if any, required by the rules of the Supreme Court;

Supreme Court.

The petition shall have attached affidavits, records or other evidence supporting its allegations or shall state why they are not attached.

SECTION 4. Relief under this Act shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the Constitution of this State or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either Constitution requires retrospective application of that right.

SECTION 5. When the clerk of the trial court receives any petition applying for relief under this Act, he shall forthwith:

(1) make three copies of the petition,

(2) docket and file the original petition and its attachments,

(3) mail one copy of the petition to the Attorney General and Reporter, Supreme Court Building, Nashville,

(4) mail or forward one copy of the petition to the District Attorney General,

(5) mail or forward one copy to petitioner's attorney, and

(6) notify the judge.

reasonable opportunity, with the aid of counsel, to file an amended petition.

SECTION 7. A petition for habeas corpus may be treated as a petition under this Act when the relief and procedure authorized by this Act appear adequate and appropriate, notwithstanding anything to the contrary in Title 23, Chapter 18 of the Code, or any other statute.

SECTION 8. When the petition has been competently drafted and all pleadings, files and records of the case which are before the court conclusively show that the petitioner is entitled to no relief the court may order the petition dismissed.

In all other cases the court shall grant a hearing as soon as practicable. The trial court shall issue such interlocutory orders, including a stay of execution, as may be required.

Where the petitioner is under the death sentence, the judge of any court of record with criminal jurisdiction in the county where the prisoner is confined or the justice of any appellate court may for good cause stay execution pending the filing of the petition with the trial judge and his interlocutory action thereon.

his petition raises substantial questions of fact as to events in which he participated, he shall appear and testify.

If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge. The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and District Attorney General.

SECTION 10. The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been previously determined, as herein defined.

SECTION 11. A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.

judge is empowered to issue an order directed to the clerk of any court in Tennessee to furnish without cost to the petitioner certified copies of such documents or parts of the record on file in his office as may be required.

SECTION 13. The District Attorney General shall represent the state and respond by proper pleading on behalf of the State within thirty (30) days after receiving notice of the docketing or within such time as the court orders. If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the District Attorney General is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter. The District Attorney General shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this Act. This expense shall be paid by the State of Tennessee, and shall not be included in the expense allowance now received by the various District Attorneys General.

It shall be the duty and function of the State Attorney General and his staff to lend whatever assistance may be necessary to the District Attorney General in the trial and disposition of such cases. In the event an appeal is taken

represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals.

SECTION 14. The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The District Attorney General shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments.

SECTION 15. All evidentiary hearings shall be recorded.

SECTION 16. Evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are admitted, any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits.

SECTION 17. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judgment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record.

SECTION 18. The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner and the Attorney General and Reporter at Nashville.

SECTION 19. When the trial judge conducting a hearing pursuant to this Act finds that the petitioner was denied his right to an appeal in the nature of a writ of error from his original conviction in violation of the Constitution of the United States or the Constitution of the State of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

(1) If a bill of exceptions was filed, grant a delayed appeal in the nature of a writ of error.

(2) If, in the original proceedings, a motion for a new trial was filed and overruled but no bill of exceptions was filed, authorize the filing of the bill of exceptions in the convicting court and the order authorizing the filing shall be deemed to be the order or action of the court which occasioned the filing of said bill of exceptions as authorized by Section 27-111 of the Code.

(3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of Section 27-201 of the Code.

Any bill of exceptions filed pursuant to this Section may be approved by the judge of the court wherein the petitioner was convicted irrespective of whether such judge presided over the case at the time of the original trial.

An order granting proceedings for a delayed appeal shall be deemed a final judgment for purposes of the review provided by Section 21. If either party does appeal, the time limits provided in this Section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this Section.

SECTION 20. Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by Sections 40-2014 through 40-2043 of the Code.

SECTION 21. The order granting or denying relief under the provisions of this Act shall be deemed a final judgment, and an appeal may be taken to the Court of Criminal Appeals by simple appeal. A motion for a new trial shall not be required for such appeal.

SECTION 22. The Supreme Court may promulgate rules of practice and procedure consistent with this Act, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners.

SECTION 23. When a new trial or delayed appeal in the nature of a writ of error is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail.

SECTION 24. The provisions of this Act shall not affect any petition or case now pending in any court which may have been authorized by the provisions of Section 23-1801 through 23-1848 of the Code.

SECTION 25. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

SECTION 26. Sections 23-1840 through 23-1848 of the Code are hereby repealed as of the effective date of this Act except as provided herein.

SECTION 27. This Act may be referred to as the "Post-Conviction Procedure Act."

SECTION 28. This Act shall take effect from and after July 1, 1967, the public welfare requiring it.

PASSED: May 25, 1967

SPEAKER OF THE HOUSE OF REPRESENTATIVES

SPEAKER OF THE SENATE

APPROVED:
5/26/67

GOVERNOR

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1968

No. [redacted] 40

WILLIAM JOE JOHNSON, *Petitioner*,

vs.

HARRY S. AVERY, Commissioner,
Department of Corrections
and
LAKE RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF RESPONDENTS

THOMAS C. LYNCH,
Attorney General of the State of California.
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California.
ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California.
GEORGE R. NOCK,
Deputy Attorney General of the State of California.
6000 State Building,
San Francisco, California 94102.

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1195

WILLIAM JOE JOHNSON, *Petitioner*,

vs.

HARRY S. AVERY, Commissioner,
Department of Corrections
and
LAKE RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA, AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Petitioner challenges the constitutionality of a Tennessee state prison regulation forbidding inmates to assist one another in the preparation of legal documents. The California Director of Corrections has a similar regulation, which is in force in all institutions under his control. This regulation is currently the subject of attack in several pending federal court actions. We believe the Ten-

nessee regulation involved in the instant case to be constitutional in all respects, and will so argue herein. We also believe that the California regulation, on the basis of distinguishing factors not apparent from its face, is valid irrespective of the validity of the Tennessee regulation.

Specifically, petitioner contends that a general prohibition of prisoner assistance of other prisoners in the preparation of legal documents is invalid unless the state provides appointed counsel to aid in the preparation of their pleadings all prisoners desiring to prosecute legal actions relating to their incarceration. In addition to contending that under no circumstances does such a prohibition on prisoner assistance violate any federal constitutional or statutory right of prisoners, we wish to point out that Califorina provides an alternative to prisoner assistance not considered by petitioner, which meets all constitutional objections to the Tennessee regulation which petitioner advances.

Our interest in presenting the California procedure to this Court at this time is to avoid an unnecessarily broad holding in the instant case. Should this Court reject the position of respondents, which we fully support, we respectfully request that this Court consider the California practice which, we submit, fully protects the constitutional rights of the indigent prisoner to bring his claims before the courts. By so doing, this Court could avoid confronting state and federal correctional administrators with an intolerable choice—sanctioning "jailhouse lawyers" or furnishing each prisoner with an attorney to act as his personal legal advisor. Our interest in preserving the

California procedure as a reasonable alternative to these two impermissible choices brings The People of the State of California before this Honorable Court as *amicus curiae*.

SUMMARY OF ARGUMENT

Petitioner claims that the Habeas Corpus Act, specifically, 28 U.S.C. § 2242, confers a statutory right on prisoners to receive assistance in the preparation of habeas corpus petitions addressed to federal courts and a concomitant right on other prisoners to render such assistance. This claim is utterly devoid of merit. The plain meaning of 28 U.S.C. § 2242 is merely that a habeas corpus petition shall not be considered defective merely because it is signed and verified by someone other than the person seeking release. This conclusion is reinforced by an examination of the legislative history of the 1948 amendment to the section. It would be wholly unreasonable to construe the section as conferring a federally protected right to prepare a habeas corpus petition in violation of an otherwise valid state regulation.

Also without merit is petitioner's claim that the regulation in question abridges his constitutional right of access to the courts. Under existing law, the right of access to the courts includes only the right to communicate freely with courts and judges. Since the regulation attacked does not impair this right, it is valid.

Petitioner apparently seeks to have this Court broaden the scope of the right of access to the courts, to include the right to receive assistance in the preparation of plead-

ings from either a "jailhouse lawyer" or an attorney. Should this Court consider such an extension of the right, we submit that such consideration should involve a balancing of state and individual interests. The state has an overriding interest in prohibiting the activities of "jailhouse lawyers." These activities result in two manifest evils: they pose disciplinary problems so serious as to imperil the lives of inmate "clients," and they demonstrably encourage the filing of fraudulent habeas corpus petitions and other legal pleadings, to the direct detriment of the courts and society in general, and to the indirect detriment of the same inmate "clients." The prisoner's interest in receiving such assistance is, by contrast, minimal, as prisoners are, by and large, able to prepare and present satisfactorily their own habeas corpus petitions. There are, however, two classes of prisoners to whom the foregoing does not apply: those who are unable to write, and those who, while literate, are ignorant of how to frame a habeas corpus petition. Under the California practice, however, such inmates have no need of assistance from other prisoners. The state and federal courts in California have, by court rule, prescribed detailed forms to be filled in by persons seeking writs of habeas corpus. These forms are designed to elicit, through probing questions, all facts necessary to a determination of whether a writ of habeas corpus should issue. Mimeographed copies of these forms are made available to all California state prisoners without charge. The Rules of the Director of Corrections provide that staff members shall provide all necessary assistance in filling out the forms to those unable to do so.

It is our position that the California practice of providing all prisoners with judicially approved habeas corpus forms and all necessary assistance in filling them out provides a reasonable and therefore constitutionally acceptable alternative to the demonstrably pernicious institution of the "jailhouse lawyer." Therefore, should this Court find any constitutional infirmity in the Tennessee regulation herein under attack, we submit that such infirmity could be removed by adoption of a practice similar to that of California.

ARGUMENT

I

28 U.S.C. § 2242 CREATES NO FEDERALLY-PROTECTED RIGHT IN AN INDIVIDUAL, OTHER THAN THE PERSON FOR WHOM RELIEF IS SOUGHT, TO PREPARE HABEAS CORPUS PETITIONS IN VIOLATION OF AN OTHERWISE VALID STATE REGULATION

Petitioner relies upon 28 U.S.C. § 2242, which provides, in relevant part:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

The last seven words were added by a 1948 amendment. 62 Stat. 965. Petitioner claims that this section, as so amended, creates a federally protected right in a state prisoner to receive assistance from fellow prisoners in the preparation of habeas corpus petitions addressed to federal courts and a concomitant right in other prisoners to render such assistance. This contention is so obviously

wrong that it deserves even a brief reply only because it was accepted by the District Court.

The section in question is devoted to a statement of the requisites for a valid habeas corpus petition. The plain meaning of the 1948 amendment is simply that a petition shall not be considered defective merely because it is signed and verified by someone other than "the person for whose relief it is intended."

The legislative history of the 1948 amendment reinforces this obvious conclusion. The Reviser's Note following 28 U.S.C.A. § 2242 reads:

> "Words 'or by some one acting in his behalf' were added. This follows the actual practice of the courts, as set forth in United States ex rel. Funaro v. Watchorn, CC. 1908, 164 F. 153; Collins v. Traeger, C.C.A. 1928, 27 F.2d 842, and cases cited."

The *Collins* and *Funaro* cases, of course, merely overruled objections to the sufficiency of habeas petitions, made on the ground that they were not signed and verified by the person whose release was sought. As one court put it, "often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained. . . ." *United States ex rel. Funaro v. Watchorn*, 164 Fed. 152, 153 (C.C.S.D.N.Y. 1908). The only apparent exception to this rule was that a petition by a "next friend" must state facts sufficient to "satisfy the court that the interest of the next friend is appropriate, and that there is good reason why the detained person does not himself sign and verify the complaint. . . ." *United*

States ex rel. Bryant v. Houston, 273 Fed. 915, 917 (2d Cir. 1921). Assuming that the 1948 amendment abrogated this latter requirement, a doubtful assumption in view of *Wilson v. Dixon*, 256 F.2d 536 (9th Cir.), *cert. denied*, 358 U.S. 856 (1958), it is clear that the amendment's sole effect is to insure that the validity of a petition will not be impaired by the fact that the person seeking relief did not personally sign and verify the same.

Only a strained construction of the statute could find that it confers a right, in contravention of a state prison regulation, in any person to sign and verify a petition on behalf of another, merely because a petition, so signed and verified, would not thereby be defective as a pleading. But no reasonable construction could lead to the conclusion that the statute also authorizes a prisoner to *prepare* a petition on behalf of another, in violation of an otherwise valid state regulation. We are at a loss to see how a statute prescribing the form of a pleading could be read as conferring any right to prepare a pleading. We therefore submit that it would be a gross perversion of congressional intent to construe 28 U.S.C. § 2242 as conferring a federally protected right in prisoners to give and receive assistance from one another in the preparation of habeas corpus pleadings, in contravention of an otherwise valid state prison regulation.

We may note also that petitioner has failed to demonstrate standing to raise his statutory claim. At most, the asserted right is alleged to apply only to the preparation of habeas corpus petitions addressed to federal courts. Petitioner admits, in his brief, that the record fails to show the nature of the documents he prepared for others

contrary to the rule for the violation of which he is incarcerated. It is possible, if not probable, that he prepared for other prisoners petitions for habeas corpus addressed to state courts, or pleadings in Civil Rights Act suits in federal courts, neither of which could be protected under any view of 28 U.S.C. § 2242. Thus, he has failed to show that his actions come within the claimed protection of the statute.

II

STATE OR FEDERAL CORRECTIONAL ADMINISTRATORS MAY PROPERLY PROHIBIT THE ACTIVITIES OF "JAILHOUSE LAWYERS"

The prison regulation which petitioner admittedly violated imposes a total prohibition on the giving or receiving, by prison inmates, of assistance on the part of other inmates in the preparation of legal documents. We believe that this regulation, and others like it, are valid as proper exercises of the broad discretion afforded correctional administrators to maintain prison discipline and protect the physical safety and the very lives of their charges. An outright prohibition on the activities of "jailhouse lawyers" is essential to the proper discharge of correctional administrators' responsibilities. The prisoner's constitutional right of access to the courts, as enunciated by this Court and the lower courts, is not impaired by this prohibition. Petitioner's apparent invitation to enlarge the scope of this right should be rejected, as a balancing of any conflicting interests between the state and the prisoner will weigh heavily in favor of the former, and thus justify the anti-"jailhouse lawyer" regulations. We will

further argue that an outright ban on prisoner assistance by other prisoners meets all of the objections raised by petitioner where, as in California, judicially-approved habeas corpus forms and staff assistance to inmates negate any claimed necessity for "jailhouse lawyers."

A. The Prisoner's Constitutional Right of Access to the Courts Does Not Include the Right to Receive Assistance from Other Prisoners in the Preparation of Legal Documents.

A prisoner's right of access to the courts means, essentially, the right to communicate freely with courts and attorneys. The right was originally declared by this Court in *Ex parte Hull,* 312 U.S. 546 (1941), to invalidate a prison rule permitting habeas corpus petitions to be mailed to courts only if, in the opinion of prison officials, they were properly drawn.

> "[T]he state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine," 312 U.S. at 546.

This Court has not elaborated on the nature of the right. However, a subsequent decision indicates that the right of access to the court contemplates only free communication. In *White v. Ragen,* 324 U.S. 760, 762 n.1 (1945), this Court stated:

> "It also has come to the attention of this Court that for some years the warden of the Illinois State Penitentiary, contrary to Ex parte Hull, 312 U.S. 546, denied the rights of prisoners to access to the courts unless they procured counsel to represent them. See

United States ex rel. Foley v. Ragen, D.C., 52 F.Supp. 265, Id. 7 Cir. 143 F.2d 774; United States ex rel. Bongiorno v. Ragen, D.C., 54 F.Supp. 973."

In both the *Foley* and *Bongiorno* cases, the denial of access consisted only of refusing to permit habeas corpus petitions to be sent out by prison inmates. Thus, this Court has certainly given no broader scope to the right than free communication.

We have found only one other judicial definition of the right:

> "In the context of this case, access to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." *Hatfield v. Bailleaux*, 290 F.2d 632, 637 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

We have no quarrel with this definition. But the opportunities which prisons must afford the prisoner to engage in legal work are only those necessary for an inmate to do his own legal work and file his own legal documents. If an inmate is not interfered with in the preparation, filing, and service of legal documents, he is not denied "access to the courts" under any proper understanding of that term.

Should this Court, however, consider enlarging the scope of the right of access to the courts, we submit that such consideration entails a balancing of the legitimate

interests of the state with any competing interests of the prisoner. With respect to anti-"jailhouse lawyer" regulations, the interests of the state greatly outweigh those of the prisoner.

B. The State Has an Overriding Interest in Prohibiting the Activities of "Jailhouse Lawyers."

Prison officials have two primary reasons for promulgating rules forbidding the activities of "jailhouse lawyers," *i.e.*, inmates who prepare legal documents for others. First, the practice of "jailhouse law" results in the undermining of prison discipline to the point where the physical safety and even the very lives of prisoners are endangered. The librarian of the California State Prison at San Quentin describes the problem:

> "Jailhouse lawyers do a thriving business in San Quentin. Despite their frequent claims, inmates do not do favors for other inmates without some remuneration. Therefore, when one inmate spends his time and effort doing legal research for another, it is with the clear understanding that he will be paid. Payment can take any of the following forms: commissary goods, such as candy, cigarettes and food; clothing; or a homosexual relationship. Not all 'payments' are due at the prison. The 'understanding' may require some pay-off when the debtor-inmate is paroled or discharged, or he may be expected to arrange for payment while visiting with his family.
>
> Naturally, not all such agreements are honored. Breaches may occur when an inmate is paroled or discharged sooner than had been expected, or when he is transferred to another institution. When the agreement cannot be honored, fights involving several men may ensue. Upon several occasions, *we have*

> *been compelled to isolate 'clients' in solitary confinement to protect them from their 'jailhouse lawyers.'* Alternatively, more promises are made, time periods are extended, and interest is charged. Few men escape the creditor's tenacious claws. There have been threats of blackmail, made possible because the 'lawyer'-creditor knows all the facts of his debtor's case. Nor do the threats and violence occur only within the prison. *Both may extend to family and friends of the inmate who is unable to pay.*" H. Spector, *A Prison Librarian Looks at Writ-Writing,* 56 CALIF. L. REV. 365-66 (1968). (Emphasis added.)

The same article points out that "jailhouse lawyers" tend to monopolize the prison law library to the exclusion of other inmates, and impose serious hardships upon the librarian.

Clearly, the foregoing is enough to show that there is a legitimate state interest, as well as a legitimate social interest, in proscribing the activities of "jailhouse lawyers." There is, however, an additional factor, of perhaps equal importance, justifying the type of prison regulation herein under attack. "Jailhouse lawyers" demonstrably encourage the filing of fraudulent legal pleadings, to the detriment of the courts, society as a whole, and even the inmate "clients" themselves.

The perjurious proclivities of imprisoned felons are well known and have been judicially noticed. *See Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (concurring opinion of Circuit Judge Duniway). Perhaps little can be done to discourage prisoners from lying under oath, merely "in order to get themselves even the temporary

relief of a proceeding in court," *ibid.*, but no one would seriously argue that the tendency should be encouraged. Yet permitting the activities of "jailhouse lawyers" provides just such encouragement. For confirmation, we turn to the words of a long-time, highly articulate inmate of San Quentin:

> "The last type of writ-writer to be discussed writes writs for economic gain. This group is comprised of a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a 'client's' interest aroused and determine his ability to pay, they must keep him on the 'hook.' *This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief.* The documents drafted for the client cast the writ-writer in the role of a sympathetic protagonist. After reading them, the inmate is elated that he has found someone able to present his case favorably. He is willing to pay to *maintain the lie that has been created for him.* After years of futilely applying to the court for various writs, *he will leave prison certain that he has not been accorded justice.*" C. Larsen, *A Prisoner Looks at Writ-Writing,* 56 CALIF. L. REV. 343, 348-49 (1968). (Emphasis added.)

Further confirmation, if any be needed, of the "jailhouse lawyer's" tendency to perjury and abuse of process is found in *Allison v. Wilson,* 277 F. Supp. 271 (N.D. Cal. 1967), where the court found that the plaintiff was "engaged in a patently vindictive scheme to harass and annoy law enforcement officials with frivolous and malicious suits and that the suit herein is a part of that

scheme." *Id.* at 275. Plaintiff was a state prisoner. Correctional officers, during a routine patrol, "discovered the following sign attached to the bunk of the cell in which plaintiff was the sole occupant:

> "'ATTORNEY AT LAW, CIVIL COMPLAINTS, WRITS, ETC. OFFICE HOURS 8:00 to 4:00.'" *Id.* at 272.

Thus, "jailhouse lawyers" encourage the filing of fraudulent litigation, clogging the courts with perjured pleadings, and forcing unnecessary evidentiary hearings. Worse, perhaps, they interfere with the rehabilitative process by persuading their inmate "clients" that they have been denied justice, undoubtedly embittering the deceived inmates against the law, the courts, and society in general. Their suppression is clearly an exercise of a legitimate state interest.

While the root of the evil of "jailhouse lawyering" is clearly in the payment of compensation, it is incredibly naive to assert that the answer lies in prohibiting such compensation. Such a prohibition would be totally unenforceable. Correctional officers are able presently to enforce the regulations proscribing legal assistance by inmates only by catching a prisoner in the possession of legal papers pertaining to the case of another inmate. Compensation agreements are not commonly reduced to writing, and payment itself takes place outside the gaze of correctional officers. Payment could not be proved without the testimony of either the "lawyer" or his "client." While the physical evidence of possession of another inmate's legal papers is sufficient proof of violation of existing regulations, it would obviously not prove viola-

tion of regulations permitting inmate legal assistance but proscribing compensation for such assistance. Therefore, such regulations could not be enforced, and the effect of their enactment would be to allow "jailhouse lawyers," with all the evils they bring, to flourish unhampered.

C. Prison Inmates Have Only a Limited Interest in Receiving Assistance from Non-lawyers in the Preparation of Legal Pleadings.

The interest of a prisoner in receiving, in the preparation of habeas corpus petitions and Civil Rights Act suits, assistance from non-lawyers, particularly fellow prisoners, is, we submit, limited indeed. As petitioner concedes, "a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an *acceptable* petition can be prepared by a person with a minimum of legal knowledge." *Accord, Hatfield v. Bailleaux, supra,* 290 F.2d at 640 & n.18. The District Court in the instant case agreed. See Petition, Appendix B 17. Civil Rights Act pleadings, like pleadings generally, are, of course, also properly factual in character. Therefore, if a prisoner is physically able to write, he is able to prepare a proper habeas corpus petition or Civil Rights Act complaint regardless of the extent of his legal knowledge.

For that matter, a habeas corpus petitioner's ignorance of the law may even be helpful. Clarence Earl Gideon believed and maintained at all times that he had a constitutional right to appointed counsel to represent him at trial. *See* A. Lewis, Gideon's Trumpet (1964). A knowledgeable "jailhouse lawyer" might have told him,

correctly, that he was wrong. But by persisting in his erroneous belief, he vindicated his claim. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

We have previously shown the unconscionable exploitation of inmates by "jailhouse lawyers." The latter's limited knowledge of the law is not likely to be helpful to their fellow prisoners, and may even jeopardize the vindication of a valid claim. As the Court of Appeals found,

> "[N]o favor is granted to the other prisoners by allowing them representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the bar. It takes little imagination to recognize possibilities of conflict of interest in allowing one who is a convicted murderer, rapist or burglar, serving a long sentence, to represent prisoners who have possible meritorious claims." Petition, Appendix B 21.

We submit that any value derived by prisoners from the practice of "jailhouse law" is clearly outweighed by the legitimate and urgent need of correctional administrators to prevent the practice.

D. Any Competing Interests of Sound Prison Administration and Individual Prisoners Are Reconciled by the California Procedure.

We have argued that the prison regulation at issue is valid on its face. We believe that the pernicious effects of "jailhouse lawyers" justify their prohibition regardless of that prohibition's effect upon other inmates. We recognize, however, that a counter-argument can be made—that prisoners who are physically unable to write, or who have no conception of how to frame an acceptable habeas corpus petition, may be unable to have their claims adjudicated without some assistance from other prisoners. We will submit that California has provided for this contingency in a manner which fully protects the constitutional rights of prisoners.

Commentators seem to be in agreement that the "jailhouse lawyer" is not the answer to the prisoner's problem. His incompetence, and the evils flowing from his activities, are disquieting even to those most sympathetic to prison inmates. *See generally Prison Writ-Writing: Three Essays,* 56 CALIF. L. REV. 342 (1968); Note, 19 STAN. L. REV. 887 (1967). These same commentators seem to assume, however, as did the District Court in the instant case, that the only alternative to "jailhouse lawyers" is the appointment of counsel for every prisoner desiring to institute legal action regarding his confinement. This alternative is obviously impracticable.

> "It is increasingly difficult to provide appointive counsel for those individuals whose petitions require an evidentiary hearing, and it would be virtually impossible to provide each prisoner who wished to file a petition with individual counsel." *Coonts v. Wainwright,* 2 Crim. L. Rptr. 2495 (M.D. Fla. 1968).

We do not agree that prison officials must be faced with either allowing the evils of "jailhouse-lawyering" to flourish in their prisons, or undertaking the impossible task of furnishing every inmate with a qualified attorney to act as his personal legal advisor.[1] A third, fully satisfactory alternative is afforded by the courts and correctional administrators of California.

All California state and federal district courts have by rule of court adopted forms to be filled in by persons seeking habeas corpus relief. Copies of these forms will be lodged with this Court, and furnished to counsel, concurrently with the filing of this brief. As the Court will see upon examination of these forms, they are designed to elicit, with probing questions, all facts necessary for the petitioned court to determine whether a prima facie case for habeas corpus relief has been stated. These facts include the name of petitioner's custodian, the place where he is being held in custody, the date, time, and case number of the conviction or convictions attacked, the history of his representation with respect to such convictions, the nature of the plea entered, whether an appeal was taken and, if so, citations to any published opinion, the facts

[1]We will not respond to petitioner's contention that this Court should recognize a constitutional right in prisoners to appointed counsel to prepare habeas corpus petitions. This contention was not raised in the courts below and was not presented in the Petition. Thus, it is not properly before this Court. Moreover, petitioner lacks standing to raise the claim. He fails to state that he has ever requested and been denied counsel. Rather, he asserts the right to act as counsel for other prisoners. If they have a right to appointed counsel, petitioner's basis for attacking the anti-"jailhouse-lawyer" regulation—that it withdraws needed assistance from inmates incapable of conducting their own litigation unaided—collapses. Thus, the assertion of a right to counsel is antithetical to petitioner's claim.

upon which the claim for relief is based, and the courts, if any, to which the claim has been previously presented. Mimeographed copies of these forms are made available without charge to all California state prisoners.

These forms guide the prisoner over any procedural rocks and shoals which could prevent relief, and provide for a clear and concise statement of the facts forming the basis for his claim. While petitioners frequently append arguments of law to the form petitions, federal district courts have discretion to disregard legal arguments not appearing on the forms. *Hooker v. United States District Court, Central District of California,* 380 F.2d 5 (9th Cir. 1967). Thus, preparation of a habeas corpus petition in California is a matter of filling out a form; even an inmate who does not comprehend the nature of habeas corpus can do this. A "jailhouse lawyer" is not needed, and his "legal arguments" may even be disregarded.

The problem of the illiterate prisoner is also considered and solved in California. Regulations of the Director of Corrections provide that staff members shall provide necessary assistance in filling out the habeas corpus forms to those inmates physically unable to do so. *See* California Department of Corrections Administrative Manual ¶ 330.07. The only objection to this practice we have heard voiced is the claim that conflicts of interest could arise when a prison guard is asked to help prepare a petition alleging maltreatment. *See* Note, 19 STAN. L. REV. 887, 890 (1967). However, in such cases, the requisite staff assistance to an illiterate inmate could be provided by a trusted person such as a chaplain. And, in any

event, the conflicts of interest between a "jailhouse lawyer" and his inmate "client" have been demonstrated above, and need no further explication.

Petitioner would seem to concede the constitutionality of the California practice. As he presents the question, it relates to the validity of "a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writs of habeas corpus and other legal papers, *when no other help is available . . .*" (Emphasis added.) He further states that the claimed fault of the Tennessee regulation is that it may block access to the courts on the part of prisoners who are "incapable of preparing an intelligible petition without assistance of some kind." And in challenging the conclusion of the Court of Appeals that his activities constitute the unlawful practice of law, petitioner says: "At most such assistance is clerical and the person assisting is not practicing law but is acting as a lay intermediary." If petitioner's activities consist merely of filling in forms at the direction of illiterate inmates, or acting as their stenographer, he may be correct. In that case, however, his activities could not possibly be justified if staff assistance were provided for illiterate or physically handicapped prisoners. On the other hand, if he undertakes a review of the facts of other inmates' cases and formulates legal arguments on their behalf, he is engaged in the practice of law under any definition.

We submit that the unauthorized practice of law is subject to state regulation. The state has the right to prevent the filing of false and frivolous claims by persons, acting as attorneys, who are not subject to the ethics and

discipline of the bar. As this Court has indicated, the state's right of regulation is not absolute. *See United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n,* 88 S.Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia,* 377 U.S. 1 (1964); *NAACP v. Button,* 371 U.S. 415 (1963). But a legitimate state interest in the regulation will be recognized and honored:

> "[A]lthough the petitioner has amply shown that its activities fall within the First Amendment's protections, the State has failed to advance any substantial regulatory interest, in the form of substantive evils flowing from petitioner's activities, which can justify the broad prohibitions which it has imposed." *Id.* at 444.

We submit that the implied test articulated above for determining the right of the state to regulate the practice of law within its borders is amply met in the instant case by the showing we have made of "substantive evils flowing from petitioner's activities." Any possible claim of countervailing individual interest in "jailhouse lawyering" is negated at least where, as in California, judicially-approved habeas corpus forms and the furnishing of staff assistance in filling them out obviate any need for inmate assistance in violation of correctional regulations.

CONCLUSION

This Court should uphold the prison rules here under attack as a proper exercise of the necessarily broad powers of correctional administrators to maintain prison discipline and protect the inmates in their charge. But if this Court should find any constitutional infirmity in the Tennessee regulations, this Court should hold that such infirmity could be removed by providing for judicially-approved habeas-corpus forms and staff assistance in filling them out, as California has done.

Dated, San Francisco, California,
May 17, 1968.

Respectfully submitted,

THOMAS C. LYNCH,
Attorney General of the State of California,
ALBERT W. HARRIS, JR.,
Assistant Attorney General of the State of California,
ROBERT R. GRANUCCI,
Deputy Attorney General of the State of California,
GEORGE R. NOCK,
Deputy Attorney General of the State of California,
Attorneys for Amicus Curiae.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. [redacted] 40

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections

and

LAKE RUSSELL, Warden, Tennessee State Penitentiary, Nashville, Tennessee,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

KARL P. WARDEN
Vanderbilt University Law School
Nashville, Tennessee 37203

PIERCE WINNINGHAM
CLEMENT AND SMITH
Suite 1035
J. C. Bradford Building
Nashville, Tennessee 37219

Counsel for Petitioner

On the Brief:

BRUCE E. GAGNON
Vanderbilt University Law School

INDEX

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES:

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1195

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections

and

LAKE RUSSELL, Warden, Tennessee State Penitentiary, Nashville, Tennessee,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court for the Middle District of Tennessee is reported at 252 F. Supp. 783 (M.D. Tenn. 1966). The opinion of the Court of Appeals for the Sixth Circuit is reported at 382 F.2d 353 (6th Cir. 1967).

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on August 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1964). The petition for certiorari was filed on November 9, 1967, and was granted on March 4, 1968.

Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law.

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1915 (d) (1964):

The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 2242 (1964):

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

Tennessee Code Annotated § 23-1801 (1955):

Grounds for writ.—Any person imprisoned or restrained of his liberty, under any pretense whatsoever . . . may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint.

Tennessee Code Annotated § 40-2019 (Supp. 1967):

Proceedings for writs—Indigency determined and counsel appointed.—In all proceedings for the writ of habeas corpus or the writ of error coram nobis, the court having jurisdiction of such matters shall determine the question of indigency and appoint counsel, if necessary . . .

Questions Presented

Whether a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writs of habeas corpus and other legal papers, when no other help is available, is invalid under 28 U.S.C. § 2242 or the United States Constitution.

Whether a federal district court may intervene with a writ of habeas corpus to prevent prison officials from enforcing disciplinary sanctions against a prisoner who has violated a prison regulation which conflicts with federal law.

Statement

Petitioner, William Joe Johnson is a prisoner in the Tennessee State Penitentiary. He was placed in solitary confinement on several occasions for violating a prison regulation which reads:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs." (A. 89[7])

On the last occasion, after serving eleven consecutive months in solitary confinement, petitioner sought relief in federal district court under the Civil Rights Act of 1964. (A. 7) .Construing the motion as a petition for habeas corpus (A. 7), the District Court held that the prison regulation conflicted with 28 U.S.C. § 2242, in that it had the effect of suppressing the assertion of federal constitutional rights in court by prisoners who are incapable of drafting their own petitions; the Court therefore ordered the release of petitioner from solitary confinement. (A. 49) On appeal, the Court of Appeals for the Sixth Circuit reversed; while that Court agreed with the District Court that petitioner had standing to question the validity of the prison regulation, and that a petition for habeas corpus was an appropriate procedure to attack the validity of disciplinary confinement, the Court held that judicial review of the internal affairs of a prison should be granted only in cases which clearly demonstrate an interference with fundamental constitutional rights. The Court went on to say that Tennessee has an undisputed right to regulate the practice of law within its boundaries, and that neither the Constitution nor 28 U.S.C. § 2242 provides a prison inmate a right to assist another inmate in legal matters. (A. 91)

Summary of Argument

The prison regulation here being questioned absolutely prohibits the giving of assistance by one prison inmate to another in preparation of a petition of habeas corpus. The practical effect of this prohibition is substantially to block access to the courts with jurisdiction to hear such cases when the petitioner is incapable of preparing an intelligible

petition without assistance of some kind. Petitioner submits this practice is in violation of the United States Constitution.

Petitioner further submits that 28 U.S.C. § 2242 as amended permits such assistance in the preparation of petitions.

Petitioner submits that this right to receive assistance carries with it a concomitant right in others to give the assistance needed in the preparation of these petitions.

Petitioner further submits that states may not abridge the right to apply for redress in the courts by calling the help received in the preparation of petitions "the practice of law". At most such assistance is clerical and the person assisting is not practicing law but is acting as a lay intermediary. In the absence of such assistance many prisoners would never be able to gain the attention of the courts. Further, if the state courts will not hear their causes, their capacity to exhaust state remedies is severely impaired. Since such assistance is available to persons who can afford counsel, the effect of this prison rule is to discriminate against the indigent and inarticulate prisoners in violation of the United States Constitution.

Petitioner submits that the federal courts have a duty to intervene in prison administration when, as here, the administration has acted in a fashion which interferes with fundamental rights guaranteed by the Constitution. Access to the courts is just such a right which must be protected.

Petitioner urges the view that there are other acceptable alternatives to this prison regulation. The state could provide free counsel for those prisoners who need counsel

or impose reasonable regulation on prison assistance, or provide access to public defenders charged with the responsibility of assisting prisoners. The State of Tennessee has not seen fit to adopt any of these alternatives. In the absence of some such alternatives many persons are being denied their constitutional rights because they are indigent or inarticulate.

ARGUMENT

1. A Prison Regulation Which Forbids One Inmate to Assist Another in Preparing Habeas Corpus Petitions Violates the Constitutional Right to Due Process of Law.

The prison regulation here in question does not seek reasonably to regulate Prisoner assistance; rather, it absolutely prohibits the activities of "jailhouse lawyers". Such a regulation has the effect of limiting, and perhaps denying altogether, a means of access to courts for those prisoners who are incapable of preparing their own petitions or obtaining assistance elsewhere. While an indigent prisoner may be able to obtain the assistance of court appointed counsel in both federal and Tennessee habeas corpus proceedings after he has presented a case with sufficient merit to entitle him to a hearing [*see* 28 U.S.C. § 1915 (d) (1964) and Tenn. Code Ann. § 40-2019 (1966)], there is no provision under either law for the appointment of counsel in the preparation of petitions. It is in this context that the prison regulation should be viewed.

From its experience with habeas corpus petitions, the District Court noted that many prisoners, inarticulate, illiterate or of substandard intelligence, would be "totally

incapable of preparing an intelligent petition" without assistance of some kind. Recent statistics compiled by Tennessee Prison officials indicate that, simply from the standpoint of intelligence, a substantial percentage of the inmates are incapable of drafting a meaningful petition. *See* Appendix to brief, *infra*, p. 19. *See also* Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 52 Duke L.J. (April 1968). The District Court also observed that the State of Tennessee has not provided other means through which illiterate prisoners can obtain access to qualified attorneys. Of course, the same educational, psychological or mental deficiencies which make it impossible for a prisoner independently to draft an intelligent petition would also make it unlikely that he could draft a letter which would arouse an attorney's interest. A further impediment to outside assistance by an attorney is the fact that the great majority of prisoners are indigent and unable to pay a legal fee, and rare indeed is the attorney who is willing to travel to the state penitentiary to listen to the story of an indigent prisoner. Under such circumstances, the consequence of this prison regulation is that access to federal and state courts is blocked for many prisoners. Indeed, such a regulation strikes at the very threshold of the only entrance to the courts. Petitioner respectfully urges that the regulation is in violation of his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and under those decisions of this Court which declare that prisoners' channels to federal courts must not be obstructed by prison officials. *See e.g.*, *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206 (1951); *White* v. *Ragen*, 324 U.S. 760 (1945); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Ex Parte Hull*, 312 U.S. 546 (1941).

See also Coonts v. *Wainwright*, 2 Crim. L. Rep. 2495 (U.S. D.C. M.D. Fla., Feb. 29, 1968).

2. 28 U.S.C. § 2242 Grants Petitioner a Federal Right to Assist Other Inmates in Seeking Redress in Federal District Court.

In 1948, 28 U.S.C. § 2242 was amended to read: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf.*" (Emphasis added to show amendment) The District Court construed this provision to grant a federal statutory right to assistance by fellow prisoners in preparing petitions in the absence of an acceptable alternative means of assistance. Petitioner believes that since § 2242 authorizes a person to "sign and verify" a petition for another, and thus, in effect, to present the petition to the Court, *a fortiori* the section authorizes such a person to assist in drafting a petition. According to the legislative history, the amendment to § 2242 was not designed to restrict common law rights in habeas corpus petitions, but was intended to reflect "the actual practice of the courts." *See* H.R. Rep. No. 308, 80th Cong., 1st Sess., A 178 (1947). Numerous decisions relying on common law precedents affirm the right of one party to petition for habeas corpus for a second party if it is shown that the second party is incapable of filing his own petition. *See, e.g., Nash* v. *MacArthur*, 184 F.2d 606 (D.C. Cir. 1950); *Collins* v. *Traeger*, 27 F.2d 842 (9th Cir. 1928); *United States ex rel. Bryant* v. *Houston*, 273 Fed. 915 (2d Cir. 1921). Indeed, this Court has recognized the rule permitting a properly authorized third party to appear in behalf of another who is incapable of presenting a petition, *see Rosenburg* v. *United States*, 346 U.S. 273,

291 (1953) (dictum), and has heard cases on habeas corpus raised by third persons. *See, e.g., United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 263 (1954); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). This rule is clearly designed to insure that habeas corpus is equally available to persons who are incapable of preparing a petition.

Petitioner in the case at bar has never asserted a broad right to represent other inmates in actual court proceedings. Petitioner is arguing for a much narrower right to assist another inmate in getting his case before a Federal District Court, the primary task being the preparation of an intelligible letter or petition requesting the court to hear the case. Since the common law rule and, presumably, § 2242, permit one person to prepare a petition and appear before the court for another in proper cases, the rule should also protect a person who assists in preparing a petition even though his participation in the proceedings end in the preliminary stages. Otherwise the benefit conferred by the Amendment to § 2242 would be illusory to many prison inmates since illiterate or mentally handicapped prisoners are unlikely to have access to assistance from sources outside the prison.

3. Petitioner Is an Appropriate Party to Assert the Invalidity of the Prison Regulation.

While the constitutional or statutory right to prisoner assistance rests primarily in the inmate who receives assistance, since it is his right to court access which is protected, a concomitant right in others to give assistance is necessarily created. Otherwise the right to receive assistance would in most cases be rendered ineffective, since

to deny the person giving assistance is to deny the prisoner who cannot help himself. *See Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 8 (1964); *cf. Edwards* v. *California*, 314 U.S. 160 (1941), where defendant's conviction for assisting an indigent non-resident to enter the state was struck down, even though the primary right to freedom of movement was presumably in the person assisted.

4. The Prison Regulation in Issue Is Not an Appropriate Exercise of the State's Power to Regulate the Practice of Law.

The Court of Appeals upheld the validity of the prison regulation on the basis of the "undisputed right" of individual states to regulate the practice of law within its boundaries. However, recent cases indicate there is a limit on the state's power to regulate the practice of law when the regulation has the practical effect of restricting the ability of unsophisticated persons to seek legal redress in courts. *See United Mine Workers of America, Dist. 12* v. *Illinois State Bar Ass'n*, 88 S. Ct. 353 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963). In any event, the federal right in the prisoners to free access to courts must take priority over any asserted State interest in the regulation of the practice of law. In *Ex Parte Hull*, 312 U.S. 546 (1941), the Court firmly asserted that "the state and its officers may not abridge or impair petitioner's right to apply to a Federal Court for a writ of habeas corpus." 312 U.S. at 549. The right to access would be of little value to the illiterate prisoner if the State could foreclose his only effective available assistance by declaring such assistance to be the unauthorized practice of law. Moreover, as mentioned earlier, petitions of habeas corpus presented

by a "next friend" have long been permitted by the courts (*see e.g., Nash* v. *MacArthur,* 184 F.2d 606 (D.C. Cir. 1950); *Collins* v. *Traeger,* 27 F.2d 842 (9th Cir. 1928); *United States ex rel. Bryant* v. *Houston,* 273 Fed. 915 (2d Cir. 1921), and this practice has never been viewed as an unauthorized practice of law. Even in Tennessee state courts, petitions prepared by other inmates have been permitted. *See Tennessee ex rel. Dawson* v. *Henderson,* No. 38461 (Tenn., filed Oct. 28, 1967), in which the court held that a hearing must be granted on a petition which, as the court acknowledged, was prepared by a prison "writ writer" (in fact, by William Joe Johnson, Petitioner in this case). Furthermore, the Tennessee Supreme Court has strongly indicated that it would not characterize all such clerical activities as unauthorized practice. *See Haverty Furniture Co.* v. *Foust,* 174 Tenn. 203, 124 S.W. 2d 694 (1939).

Of course, the traditional reason given for the state's authority to regulate the practice of law is that the state has an interest in protecting unwary clients from the consequences of bad advice given by unscrupulous or ill-trained attorneys. Legal advice in preparing a petition for habeas corpus, however, whether by trained counsel or by a fellow prisoner, will not have permanent detrimental effects, since the petitioner is always able to present later petitions. Also, unlike the practice of law generally, the preparation of petitions, such as in this case, is directly within the supervision of the court, which is in a position to prevent abuses and limit the consequences of bad advice. But most important is the fact that a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an *acceptable* petition can be prepared by a person with a minimum of legal knowledge. It is a distortion to characterize this activity as the "practice of

law"—the assistance provided should be classified as "clerical"; petitioner is acting as a lay intermediary: one who sends a letter or other document to a court, calling the court's attention to facts which are thought to merit relief. Petitioner does not dispute the fact that the best legal advice can be received from a licensed attorney, but under the circumstances, prisoner assistance is certainly preferable to the alternative of no assistance at all. And no assistance at all is the inevitable result of interpreting and prohibiting petitioner's activities as the practice of law.

The prison regulation in this case makes no distinction between assistance in federal court and state court petitions, and the record does not show whether petitioner was disciplined for assisting in a federal or a state court petition. Petitioner believes this should not matter. As to federal court petitions, the state should not be permitted to discipline a prisoner for conducting an activity which is authorized and acknowledged by a federal district court, since the practice of law before a federal court is peculiarly within the province of supervision of the federal court and should not be subject to state regulation. *See Sperry* v. *Florida*, 373 U.S. 379 (1963); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966); *Lefton* v. *City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964). Furthermore, if there is a right to assist in federal court but not state court petitions, the prison regulation, absolute on its face, should be held invalid because of its inhibitive effects on protected activity (assistance in federal petitions), even though petitioner was disciplined for assisting in a state petition. *See Thornhill* v. *Alabama*, 310 U.S. 88 (1940). More important, petitioner believes that the right to assistance should be applied with equal vigor in state petitions, in view of the fact that a prisoner, in order to attack a conviction by

federal habeas corpus, must "exhaust his state court remedies." The state proceeding would become a stumbling block to federal relief if a prisoner cannot have assistance in state petitions since he may not be able to prepare an intelligible petition without assistance, so as to raise the merits in the state court and "exhaust his state remedies." Moreover, since the state has made available habeas corpus proceedings (*see* Tenn. Code Ann. Section 23-1801 (1955)), a prison regulation which has the effect of making these procedures available only to literate or wealthy prisoners violates the equal protection clause of the Fourteenth Amendment. *See Smith* v. *Bennett,* 365 U.S. 708 (1961). (Filing fee for state habeas corpus petitions held invalid.) The effect of the prison regulation is to discriminate against an identifiable class of illiterate or inarticulate prisoners, and this form of discrimination is just as invidious as a discrimination against indigents.

Petitioner also would point out to the court that respondent is not charged with the responsibility of promulgating rules regarding the unauthorized practice of law in Tennessee and thus the prison regulation in question may not be justified on that basis. *See Coonts* v. *Wainwright,* 2 Crim. L. Rep. 2495 (U.S.D.C. M.D. Fla., Feb. 29, 1968).

5. The District Court Had the Power and the Duty to Order the Prison Officials to Release Petitioner From Solitary Confinement.

While Federal courts have traditionally been reluctant to issue orders which may interfere with the internal administration of prisons, it has always been understood that a federal court has the *power* to issue such an order—the only question is whether the court *should* issue the particular order requested. It should be noted that the Fed-

eral District Court order in this case, ordering petitioner's release from solitary confinement, does not have the effect of supervising the internal affairs of Prison Administration. The order is negative in character: it prevents the enforcement of an invalid regulation. No affirmative duties are imposed on the prison officials which would require continued Court supervision. Moreover, as the Court of Appeals for the Sixth Circuit framed the issue, prison regulations are subject to review only if "it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the constitution" (Appendix, p. 93). Petitioner submits that the right to free access to federal and state courts is such a "fundamental right". In *Ex Parte Hull*, this Court said that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. 546, 549 (1941). *See also Dowd* v. *United States ex rel. Cook*, 340 U.S. 206 (1951); *White* v. *Ragen*, 324 U.S. 760 (1945); *Cochran* v. *Kansas*, 316 U.S. 255 (1942).

Summary

Petitioner recognizes that problems of discipline and inmate morale might justify regulation of "jailhouse lawyers." Petitioner submits, however, that any such regulation must not operate in such a way as to obstruct a systematic judicial consideration of prisoner petitions. The chief problem with the Tennessee prison regulation is its "overkill": less drastic measures would have sufficed. One state has solved this difficulty by providing an alternative means of assistance to prisoners through a public defender program. *See* Ind. Stat. Ann. §§ 13-1401 to 13-1406 (1956). In New Jersey, prisoners may receive assistance from li-

censed attorneys in preparing petitions by virtue of a New Jersey Supreme Court rule. *See* Rossmore & Koenigsberg, *Habeas Corpus and the Indigent Prisoner*, 11 Rutgers L. Rev. 611 (1957). In Oregon and Minnesota, trained attorneys represent the prisoners as public defenders. In North Dakota, the County Bar Associations have set up a voluntary arrangement through which licensed attorneys are sent to the prisons on a regular basis to provide free legal advice. *See* Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 52 Duke L.J. (April 1968). In any event, the District Court in this case was not unaware of disciplinary problems:

> This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers," activities which doubtless cause many problems, including problems of prison discipline and morale. It may be, for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered, if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to prison inmates any reasonable alternative, such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or applications for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect

of silencing forever any constitutional claims which many prisoners might have. (Appendix, p. 46).

In this case, the petitioner does not seek the right to practice law; nor does he seek an unfettered right to assist other inmates. What he does seek is the right to assist other inmates, subject to reasonable regulations, until the State of Tennessee has provided some alternative and effective means of assistance which assures that all inmates will have satisfactory access to the courts.

Petitioner has consistently maintained that he would not engage in this prohibited activity if there were any other effective way for prisoners to receive help in calling their causes to the attention of the appropriate courts. (Appendix, p. 80). At this time there is no decision from this court declaring that a right to counsel exists in post conviction habeas corpus proceedings. And, of necessity, no decision describes when such a right would obtain. Petitioner respectfully urges the court to find that such a right does exist; that it is an integral part of procedural due process under the First, Fifth, Sixth and Fourteenth Amendments; that the fact that habeas corpus is labeled a civil remedy must not be allowed to obscure the very real fact that its primary function in our society is as a procedure to regain liberty lost through the criminal process. *See Smith* v. *Bennett*, 365 U.S. 708, 712 (1961). To be effective, a right to counsel must attach at the crucial time in the process. If no assistance is provided at the time the petition for the court is being prepared, it is unlikely that the petition will ever reach the stage of an actual hearing before the court. To receive due process in a post conviction proceeding the right to counsel must not be withheld until a critical stage in the proceedings has been

reached and passed. The State of Tennessee has not only failed to meet its obligations to provide assistance but has gone further and, by the use of this prison rule, has placed an additional burden on potential petitioners by denying them even the minimal assistance of a fellow inmate's clerical work. There is no equality in a system which allows the rich, the articulate, or the literate to have their causes heard but denies or limits in any degree a hearing of the petitions for redress against the government of those who are poor, or illiterate, or inarticulate. A decision by this court allowing prisoners to assist fellow prisoners will be a desirable step forward, but the only lasting solution is one which will require appointment of trained counsel to assist in the preparation of such petitions.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to the Court of Appeals with instructions to remand it to the District Court with instructions that Petitioner be released from solitary confinement and restored to his status as an ordinary prisoner and that the prison regulation prohibiting inmate assistance in the preparation of petitions for habeas corpus be declared void.

KARL P. WARDEN
Counsel for Petitioner

Appendix to Brief

STATISTICAL SUMMARY ON INMATE POPULATION ISSUED BY THE TENNESSEE STATE PENITENTIARY

INTELLIGENCE QUOTIENT

July 1, 1965 to June 30, 1966

	Number of Inmates
Very Superior	0
Superior	9
Above Average	91
Average	690
Below Average	308
Inferior	169
Defective	157

July 1, 1966 to June 30, 1967

	Percentage of Inmates
Very Superior	none
Superior	1%
Above Average	6%
Average	49%
Below Average	22%
Inferior	12%
Defective	10%

Note: The following scale is suggested by the Beta Test Manual

Score	*Range*
Exceeding 129	Very Superior
120-128	Superior
110-119	Above Average
90-109	Average
80- 89	Below Average
71- 79	Inferior
Below 70	Defective

INDEX.

Cases Cited.

Texts and Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1195.

WILLIAM JOE JOHNSON,
Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections,
and
LAKE F. RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF FOR THE RESPONDENTS.

QUESTIONS PRESENTED.

Whether 28 U. S. C., § 2242 authorizes the petitioner to prepare habeas corpus petitions for other penitentiary inmates.

Whether a prison regulation prohibiting penitentiary inmates from preparing petitions for writs of habeas corpus for other inmates denies or unduly restricts reasonable access to the courts.

ARGUMENT.

I.

Neither the Language Nor the Policy of 28 U. S. C., § 2242 Authorizes the Petitioner to Prepare Habeas Corpus Applications for Other Inmates.

In **Gusman v. Marrero**, 180 U. S. 81 (1901), this Court held that a private citizen may not maintain a suit to compel the release of another regardless of his friendship and sympathy with the person detained or of his concern that unconstitutional laws might be enforced. Early decisional law, however, permitted one person to sign and verify petitions on behalf of another in certain instances where the party in interest lacked physical access to the courts and where the third-party applicant demonstrated a sufficient interest in the proceeding. Thus, an attorney was permitted to verify a habeas petition in a deportation case. **United States ex rel. Funaro v. Watchorn**, 164 Fed. 152 (C. C. S. D. N. Y. 1908):

> "[I]t has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained . . ." 164 Fed. at 153.

Relatives, parents and guardians having a superior right to the custody and control of a person illegally detained have been permitted to make an application on behalf of members of the Armed Forces. **Ex Parte Dostal**, 243 Fed. 664 (D. C. N. D. Ohio 1917). This practice was limited somewhat by the decision of **United States ex rel. Bryant v. Houston**, 273 Fed. 915 (2nd Cir. 1921), requiring that a "next friend" application set forth some reason or explanation, satisfactory to the court, why the complaint is not signed and verified by the person detained and fur-

ther that a sufficient relationship be shown between the parties. It has also been held that a petition may be signed and verified by a person authorized to act on behalf of another who is in peril of being removed from the jurisdiction of the court before he can act in person. **Collins v. Traeger**, 27 F. 2d 842 (9th Cir. 1928).

Section 2242 of the Judicial Code was amended in 1948 to follow the actual practice of the courts:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended **or by someone acting in his behalf.**"

Therefore, in **Nash v. MacArthur**, 184 F. 2d 606 (D. C. Cir. 1950), **cert. denied** 342 U. S. 838 (1951), an attorney was permitted to sign and verify a petition filed on behalf of certain Japanese nationals. However, in **Wilson v. Dixon**, 256 F. 2d 536 (9th Cir. 1958), the Court held that the latter phrase did not abolish the requirements that a satisfactory reason or explanation be given why the detained person did not sign and verify the complaint and that a showing be made as to the relationship between the "next friend" and person detained. Also see the connected case of **Wilson v. Dixon**, 251 F. 2d 338 (9th Cir. 1958), **cert. denied** 358 U. S. 856 (1958).

The District Court, relying on the 1948 amendment, held that § 2242 created a federally-protected right in the petitioner to prepare habeas applications for fellow inmates. The Court of Appeals found to the contrary:

> "The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is

addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers."

The District Court's construction of § 2242 and more particularly the amendment thereto is at best tenuous. The statute in question deals with the sufficiency of habeas applications and in certain instances permits third parties to sign and verify petitions on behalf of another for good cause shown. The provisions of § 2242 are procedural rather than substantive and it is respectfully submitted that this statute cannot properly be construed as conferring a federally-protected right in the petitioner to prepare habeas applications on behalf of other inmates of the Tennessee State Penitentiary. This section of the Judicial Code would further appear to be inapplicable to the case at bar since the petitions prepared by Johnson are actually signed and verified by the person or persons on whose behalf they are filed.

II.

A Prison Regulation Which Forbids Penitentiary Inmates From Preparing Petitions for Writs of Habeas Corpus for Other Inmates Neither Denies Nor Unduly Restricts Reasonable Access to the Courts.

A denial of or undue restraint on reasonable access to the courts violates the due process and equal protection clauses of the Constitution. Ex Parte Hull, 312 U. S. 546 (1941); Cochran v. Kansas, 316 U. S. 255 (1942) and

Dowd v. United States, 340 U. S. 206 (1951). It is upon this premise that the petitioner's position must be bottomed.

The instant case presents a somewhat different twist in that the petitioner does not contend that he himself has been denied reasonable access to the courts but rather insists that other inmates are denied access when he (petitioner) is prohibited from preparing petitions in their behalf. As a matter of fact, the petitioner has filed numerous petitions on his own behalf. See e. g. **In Re Johnson**, 277 F. Supp. 267 (D. C. E. D., Tenn. 1967), and **State ex rel. Johnson v. Heer**, 219 Tenn. 604, 412 S. W. 2d 218 (1966).

The State of Tennessee has attempted to provide penitentiary inmates with an effective, uncomplicated and expeditious procedure within which to challenge the constitutionality of criminal convictions. These provisions are codified in Tenn. Code Ann., §§ 40-3801 through 3824. Tennessee's Post-Conviction Procedure Act is set forth in its entirety in the Appendix to the Brief. Under this Act, all that is required is a simple statement of fact alleging a deprivation of a constitutional right. Legal citations are neither required or desired. Allegations contained in petitions filed by penitentiary inmates are liberally construed and are viewed in a light most favorable to the petitioner. Wide leeway is given within which to amend and in many cases, appointed counsel will amend the petitions after consultation with the petitioner.

> "40-3807. **Amendment of petitions not in prescribed form.**—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition.
>
> * * * * * * *

"40-3815. **Dismissal, withdrawal or amendment of Petitions.**—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, **with aid of counsel**, to file amendments.

* * * * * * * *

"40-3821. **Determination of indigency—Appointment of counsel and court reporters.**—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014—40-2043."

Habeas applications are accorded similar treatment when filed in the Federal Courts. **Price v. Johnston**, 334 U. S. 266 (1948); **Gibbs v. Burke**, 337 U. S. 773 (1949); **Darr v. Burford**, 339 U. S. 200 (1950), and **Sanders v. United States**, 373 U. S. 1 (1963).

Access to the courts has been defined to mean "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters." **Hatfield v. Bailleaux**, 290 F. 2d 632, 637 (9th Cir. 1961), **cert. denied**, 368 U. S. 862 (1961). Another definition has been extended to include "not only the right to place a petition for relief in the mails . . . but also

the right to possess in his cell the legal materials which the inmate desires to include in such a document while they are being collated into mailable form." **In Re Schoengarth**, 57 Cal. Rptr. 600, 425 P. 2d 200, 207 (1967).

That penitentiary inmates are afforded reasonable access to the courts in Tennessee is beyond peradventure. This is certainly true within the historical understanding of that phrase. There of course is a distinction between access to the courts and a means to effect a remedy. **Roberts v. Peppersack**, 256 F. Supp. 415, 433 (D. C., Md. 1966), **cert. denied**, 389 U. S. 877 (1967). Prison rules and regulations governing the latter have been consistently upheld. **Hatfield v. Bailleaux**, *supra*; **Lee v. Tahash**, 352 F. 2d 970 (8th Cir. 1965); **Walker v. Pate**, 356 F. 2d 502 (7th Cir. 1966); **Vida v. Cage**, 385 F. 2d 408 (6th Cir. 1967); **United States v. Myers**, 244 F. Supp. 826 (D. C. E. D., Penn. 1965); **United States ex rel. Wakeley v. Pennsylvania**, 247 F. Supp. 7 (D. C. E. D., Penn. 1965), and **Roberts v. Peppersack**, *supra*.

State officials have been authorized to adopt, promulgate and enforce rules and regulations with reference to the internal management and discipline of prison inmates. The courts traditionally have expressed a reluctance to interfere with prison administration unless it can be clearly demonstrated that certain rules or regulations violate fundamental Constitutional rights. **Childs v. Pegelow**, 321 F. 2d 487 (4th Cir. 1963), **cert. denied**, 376 U. S. 932 (1964); **Sostre v. McGinnis**, 334 F. 2d 906 (2nd Cir. 1964); **cert. denied**, 379 U. S. 892 (1964); **United States v. Marchese**, 341 F. 2d 782 (9th Cir. 1965), **cert. denied**, 382 U. S. 817 (1965); **Landman v. Peyton**, 370 F. 2d 135 (4th Cir. 1966), **cert. denied**, 388 U. S. 920 (1967).

The activity of the petitioner within the confines of the State penitentiary unquestionably presents substantial disciplinary problems. The presence and curtailment of inmate "writ-writers" is not unique in Tennessee. See

e. g., **DeWitt v. Pail**, 366 F. 2d 682 (9th Cir. 1966), and **Austin v. Harris**, 226 F. Supp. 304 (D. C. W. D., Mo. 1964). In the last analysis, it is the "inmate-client" himself who will inevitably suffer the most from the practice of "jailhouse lawyers". Numerous petitions prepared by the petitioner are in the record before the Court. Petitioner raises substantially the same grounds in every petition. See **State ex rel. Callahan v. Henderson**, ... Tenn. ..., 417 S. W. 2d 789 (1967). In many instances, the "inmate-client" will have little knowledge or comprehension of the factual averments contained in the petition prepared in his behalf. It is not inconceivable that possible meritorious claims may be overlooked entirely or subjected to inadequate factual development due to the standardized potpourri of spurious allegations inserted in every petition prepared by the petitioner. Some institutions have established "writ rooms" in an attempt to eliminate the influence of "jailhouse lawyers". It has been noted that such rooms are "probably more of a blessing than a curse". **Ex Parte Wilson**, 235 F. Supp. 988 (D. C. E. D. S. C. 1964). Also see the connected case of **Ex Parte Wilson**, 242 F. Supp. 537 (D. C. E. D. S. C. 1965). It is lack of legal knowledge rather than illiteracy which encourages fellow inmates to seek the services of the petitioner. For some time, the petitioner has held himself out as having a superior skill and knowledge in this field, an illusion unfortunately shared by many in the prison population. The Court below correctly recognized that "no favor is granted to the other prisoners by allowing the representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the law." 382 F. 2d at 357.

The petitioner is engaged in the practice of law under any definition. See e. g. T. C. A., § 29-302. He is neither assisting (in the true sense of that word) nor is he acting merely in a clerical capacity. It is clear from the record

that the petitioner, alleging substantially the same constitutional violations, drafts these petitions from beginning to end. "Obviously the right to practice law or to maintain a law department within the confines of a state penitentiary is not a right secured by the Constitution of the United States." **Siegel v. Ragen**, 180 F. 2d 785 (7th Cir. 1950), **cert. denied** 339 U. S. 990 (1950). In this regard, the Court below held as follows:

> "In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary . . .
>
> "The main thrust of the District Court's opinion on this issue was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders." 382 F. 2d at 356.

The distinction between obstructing access to the courts and prohibiting one prisoner from drafting legal papers for another was considered in **Brabson v. Wilkins**, 19 N. Y. 2d 433, 227 N. E. 2d 383 (1967):

> "There is an essential difference between obstructing a prisoner's access to a court in his own right and a rule stopping him from drawing up legal papers for other prisoners. No prisoner has a constitutional right to draw legal papers for other people. It is not possible to deduce such a right from anything said or decided in Ex Parte Hull . . ." 227 N. E. 2d at 384.

The **Brabson** decision was cited with approval in **Owens v. Russell**, 277 F. Supp. 390 (D. C. M. D. Penn. 1967):

> "Owens is not being denied access to the courts by a rule prohibiting another inmate with more legal

ability from drawing his petition for him. All that is required in a habeas corpus petition is a statement of the facts on which the petitioner bases his claim that he is being held illegally." 277 F. Supp. at 391.

Respondents respectfully submit that the Court below properly concluded that:

> "The problem of providing effective access to legal assistance at all stages of criminal justice, from pretrial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court." 382 F. 2d at 357.

CONCLUSION.

The petitioner clearly has not been denied access to the courts. Submitted, neither have the other inmates of the Tennessee State Penitentiary. Although the petitioner's motive in this regard is immaterial, it would be unrealistic to consider same entirely altruistic. It is true that some prisoners may have more ability than others. This fact, however, does not justify the activity of the petitioner within the confines of the State Penitentiary. Should a prisoner overlook a ground for relief in one petition, he may, of course, file another. There is absolutely no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf. Prisoners do not seek the services of the petitioner due to illiteracy but rather state that they lack the necessary "legal knowledge". Tennessee provides penitentiary inmates with a fair and simple procedure within which to challenge the constitutionality of criminal convictions. Once a petition is filed, counsel is appointed almost as a matter of course.

Although the regulation in question was undoubtedly adopted as a disciplinary measure, it will inevitably be the "inmate client" who suffers the most from this practice. Surely, little benefit results from the filing of substantially identical petitions on behalf of numerous inmates. There is an essential difference between obstructing a prisoner's access to the courts and a regulation prohibiting the petitioner from drafting legal papers for others. It is therefore respectfully submitted that neither the intent nor the effect of the regulation in question denies or restricts access to the courts.

GEORGE F. McCANLESS,
Attorney General & Reporter,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

DAVID W. McMACKIN,
Assistant Attorney General,
State of Tennessee,
Supreme Court Building,
Nashville, Tennessee 37219,
Counsel for Respondents.

Certificate of Service.

Karl P. Warden,
Vanderbilt University Law School,
Nashville, Tennessee 37203;

Pierce Winningham,
Clement and Smith,
Suite 1035,
J. C. Bradford Building,
Nashville, Tennessee 37219.

APPENDIX TO BRIEF.

CHAPTER 38—POST-CONVICTION PROCEDURE.

Section.

40-3801. Title.

40-3802. When prisoners may petition for post-conviction relief.

40-3803. Filing of petition.

40-3804. Contents of petition and supporting papers.

40-3805. When relief granted.

40-3806. Processing of petitions by clerk of trial court.

40-3807. Amendment of petitions not in prescribed form.

40-3808. Petitions for habeas corpus may be treated as petitions under this chapter,

40-3809. Procedure when petition is before the court.

40-3810. Presentation of evidence at hearing—Transportation of petitioner.

40-3811. Scope of hearings.

40-3812. When ground for relief is "previously determined".

40-3813. Furnishing certified copies of documents or other parts of the record to indigent petitioners.

40-3814. District attorney-general shall represent state.

40-3815. Dismissal, withdrawal or amendment of petitions.

40-3816. Recording of evidentiary hearings.

40-3817. Taking of evidence.

40-3818. Final disposition of petitions.

40-3801. Title.—This chapter may be referred to as the "Post-Conviction Procedure Act." [Acts 1967, ch. 310, § 27.]

40-3802. When prisoners may petition for post-conviction relief.—A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied. [Acts 1967, ch. 310, § 1.]

40-3803. Filing of petition.—To begin proceedings under this chapter, the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the state of Tennessee as the defendant. No filing fee shall be charged. [Acts 1967, ch. 310, § 2.]

40-3804. Contents of petition and supporting papers.—The petition shall briefly and clearly state:

1. Petitioner's full name and address;

2. The indictment number, if known, and the offenses for which the sentence was pronounced;

3. The name and location of the court which pronounced the sentence;

4. The date the sentence was pronounced;

5. The terms of the sentence;

6. What restraint of liberty is presently being imposed;

7. Who is imposing the present restraint, and when it commenced;

8. Any appeals and all other applications for relief previously filed including the date decided, the court, the grounds asserted and the result;

9. The names of the lawyers who have represented the petitioner and at what stage of the proceedings;

10. Facts establishing the grounds on which the claim for relief is based, whether they have been previously presented to any court and, if not, why not. If no prior petition under this chapter has been filed, the petition shall set forth each of the individual grounds, if any, required by the rules of the Supreme Court;

11. Whether the petitioner has a lawyer and, if not, whether he has funds to hire a lawyer; and

12. Any other information required by rule of the Supreme Court.

The petition shall have attached affidavits, records or other evidence supporting its allegations or shall state why they are not attached. [Acts 1967, ch. 310, § 3.]

40-3805. When relief granted.—Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the Constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the

trial if either Constitution requires retrospective application of that right. [Acts 1967, ch. 310, § 4.]

40-3806. Processing of petitions by clerk of trial court.—When the clerk of the trial court receives any petition applying for relief under this chapter, he shall forthwith:

(1) make three (3) copies of the petition,

(2) docket and file the original petition and its attachments,

(3) mail one (1) copy of the petition to the attorney-general and reporter, Supreme Court Building, Nashville,

(4) mail or forward one (1) copy of the petition to the district attorney-general,

(5) mail or forward one (1) copy to petitioner's attorney, and

(6) notify the judge. [Acts 1967, ch. 310, §5.]

40-3807. Amendment of petitions not in prescribed form.—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition. [Acts 1967, ch. 310, § 6.]

40-3808. Petitions for habeas corpus may be treated as petitions under this chapter.—A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate, notwithstanding anything to the contrary in title 23; chapter 18 of the Code, or any other statute. [Acts 1967, ch. 310, § 7.]

40-3809. Procedure when petition is before the court.—When the petition has been competently drafted and all pleadings, files and records of the case which are before

the court conclusively show that the petitioner is entitled to no relief, the court may order the petition dismissed.

In all other cases the court shall grant a hearing as soon as practicable. The trial court shall issue such interlocutory orders, including a stay of execution, as may be required.

Where the petitioner is under the death sentence, the judge of any court of record with criminal jurisdiction in the county where the prisoner is confined or the justice of any appellate court may for good cause stay execution pending the filing of the petition with the trial judge and his interlocutory action thereon. [Acts 1967, ch. 310, § 8.]

40-3810. Presentation of evidence at hearing—Transportation of petitioner.—If the petitioner has had no prior evidentiary hearing under this act and in other cases where his petition raises substantial questions of fact as to events in which he participated, he shall appear and testify.

If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge. The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney-general. [Acts 1967, ch. 310, § 9.]

40-3811. Scope of hearings.—The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded

because they have been previously determined, as herein defined. [Acts 1967, ch. 310, § 10.]

40-3812. When ground for relief is "previously determined."—A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. [Acts 1967, ch. 310, § 11.]

40-3813. Furnishing certified copies of documents or other parts of the record to indigent petitioners.—If the judge finds that the petitioner is indigent as defined in § 40-2014, the judge is empowered to issue an order directed to the clerk of any court in Tennessee to furnish without cost to the petitioner certified copies of such documents or parts of the record on file in his office as may be required. [Acts 1967, ch. 310, § 12.]

40-3814. District attorney-general shall represent state.—The district attorney-general shall represent the state and respond by proper pleading on behalf of the state within thirty (30) days after receiving notice of the docketing or within such time as the court orders. If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney-general is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter. The district attorney-general shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys-general.

It shall be the duty and function of the state attorney-general and his staff to lend whatever assistance may be necessary to the district attorney-general in the trial and

disposition of such cases. In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the state attorney-general and his staff shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals. [Acts 1967, ch. 310, § 13.]

40-3815. Dismissal, withdrawal or amendment of petitions.—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments. [Acts 1967, ch. 310, § 14.]

40-3816. Recording of evidentiary hearings.—All evidentiary hearings shall be recorded. [Acts 1967, ch. 310, § 15.]

40-3817. Taking of evidence.—Evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are admitted, any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits. [Acts 1967, ch. 310, § 16.]

40-3818. Final disposition of petitions.—If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judg-

ment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record. [Acts 1967, ch. 310, § 17.]

40-3819. Notice of final judgments by clerk of court.— The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner and the attorney-general and reporter at Nashville. [Acts 1967, ch. 310, § 18.]

40-3820. When petitioner denied right of appeal in violation of the Constitution—Procedure.—When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal in the nature of a writ of error from his original conviction in violation of the Constitution of the United States or the Constitution of the state of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

(1) If a bill of exceptions was filed, grant a delayed appeal in the nature of a writ of error.

(2) If, in the original proceedings, a motion for a new trial was filed and overruled but no bill of exceptions was

filed, authorize the filing of the bill of exceptions in the convicting court and the order authorizing the filing shall be deemed to be the order or action of the court which occasioned the filing of said bill of exceptions as authorized by § 27-111.

(3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of § 27-201.

Any bill of exceptions filed pursuant to this section may be approved by the judge of the court wherein the petitioner was convicted irrespective of whether such judge presided over the case at the time of the original trial.

An order granting proceedings for a delayed appeal shall be deemed a final judgment for purposes of the review provided by § 40-3822. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section. [Acts 1967, ch. 310, § 19.]

40-3821. Determination of indigency—Appointment of counsel and court reporters.—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014-40-2043. [Acts 1967, ch. 310, § 20.]

40-3822. Appeal after final judgment.—The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be

taken to the Court of Criminal Appeals by simple appeal. A motion for a new trial shall not be required for such appeal. [Acts 1967, ch. 310, § 21.]

40-3823. Supreme Court may promulgate rules of practice and procedure.—The Supreme Court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners. [Acts 1967, ch. 310, § 22.]

40-3824. Bail during new trial or delayed appeal—Exception.—When a new trial or delayed appeal in the nature of a writ of error is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail. [Acts 1967, ch. 310, § 23.]

Effective Date. Acts 1967, ch. 310, § 28.

July 1, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 40

WILLIAM JOE JOHNSON,

Petitioner,

—v.—

HARRY S. AVERY, Commissioner, Department of Correction and LAKE RUSSELL, Warden, Tennessee State Penitentiary,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF, AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

KRISTIN GLEN
30 East 42nd Street
New York, N. Y.

Attorneys for Amici Curiae

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 40

WILLIAM JOE JOHNSON,

Petitioner,

—v.—

HARRY S. AVERY, Commissioner, Department of Correction and LAKE RUSSELL, Warden, Tennessee State Penitentiary,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Motion for Leave to File Brief Amici Curiae[1]

The American Civil Liberties Union believes that the constitutional rights of prisoners should be as closely guarded as those of citizens in general, perhaps more so since the usual political process is generally unavailable to prisoners for the redress of their grievances.

The ACLU believes that this case presents important questions as to the rights of two separate classes of prisoners: the First Amendment right of prisoners to give legal aid to fellow inmates, and the right of untutored or il-

---

[1] Counsel for Petitioner consented to the filing of this brief. Counsel for Respondents did not reply to Amici's request for consent.

literate inmates to receive such assistance in order to have free access to the courts.

There has for too long been a "vast no man's land between the constitutional rights of a prisoner on the one hand and the disciplinary rights of the authorities on the other hand" [2] and the ACLU wishes to take this occasion to urge the Court to enunciate clearly that prisoners are not "constitutional non-persons" but that they retain all the rights of ordinary citizens, including that of free speech, except to the extent that they may be curtailed by the compelling need to maintain necessary discipline.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

[2] *Beckett* v. *Kearney*, 247 F. Supp. 219, 220 (N. D. Ga. 1965).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 40

WILLIAM JOE JOHNSON,

Petitioner,

—v.—

HARRY S. AVERY, Commissioner, Department of Correction and LAKE RUSSELL, Warden, Tennessee State Penitentiary,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE

Interest of Amici

The interest of Amici is set out in the preceding motion.

Statement of Facts[3]

Petitioner is a prisoner in the Tennessee State Penitentiary who was placed in solitary confinement for violating a prison regulation which absolutely forbids inmates to

---

[3] Adopted from petitioner's brief.

"advise, assist or otherwise contract to aid" another inmate, whether with or without a fee, in the preparation of petitions for habeas corpus or other legal papers.

After serving eleven months in solitary confinement petitioner brought an action in the United States District Court for the Middle District of Tennessee, seeking relief under the Civil Rights Act. The District Court treated the action as a petition for habeas corpus and ordered petitioner's release from solitary confinement. It held that the prison regulation conflicted with 28 U. S. C. §2242, and further that it had the effect of suppressing the assertion of federal constitutional rights by prisoners who are unable to draft their own petitions.

On appeal, the United States Court of Appeals for the Sixth Circuit reversed. It found that petitioner had standing, and that habeas corpus was the appropriate means of attacking the validity of confinement for disciplinary reasons. However, it found that courts should only review the internal management of prison affairs when there is a clear interference with fundamental constitutional rights, and that no such interference was shown in the instant case. The court further held that Tennessee has the right to regulate the practice of law within that state, and that neither the Constitution nor 28 U. S. C. §2242 allow a prisoner the right to assist a fellow prisoner in legal matters.

ARGUMENT

I.

Petitioner was punished for exercising his right to free speech protected by the First and Fourteenth Amendments.

We urge this Court to adopt the theory, first accepted in *Coffin* v. *Reichard*, 143 F. 2d 443, 445 (6th Cir. 1944), *cert. denied*, 355 U. S. 887 (1945), that

> "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."

Though certain rights and privileges must be limited by the necessities of the penal system, see, e.g., *Price* v. *Johnston*, 324 U. S. 266 (1948) (right of prisoner to personally argue his appeal), the category of such curtailed rights should be narrowly confined by the Constitution.

While prison discipline need not bow before the entire range of constitutional rights, it is clear that the due process and equal protection clauses of the Fourteenth Amendment follow convicted persons into prison. E.g., *Jackson* v. *Godwin*, No. 25299 (5th Cir. July 23, 1968); *Lee* v. *Washington*, 263 F. Supp. 327, 331 (M. D. Ala. 1966), *aff'd per curiam*, 390 U. S. 333 (1968); *Jackson* v. *Bishop*, 268 F. Supp. 804, 807 (E. D. Ark. 1967). A prisoner retains the rights incorporated by those clauses, including, as here, the freedom of speech guaranteed by the First Amendment.

The federal courts have given increasingly broad consideration to the protection of the so-called "retained

rights" of prisoners. Most notable, perhaps, has been the protection of freedom of religion in the Black Muslim cases. E.g., *Sostre* v. *McGinnis*, 334 F. 2d 906 (2nd Cir. 1964), *cert. denied*, 379 U. S. 892 (1964); *Sewell* v. *Pegelow*, 291 F. 2d 196 (4th Cir. 1961); cf. *Cooper* v. *Pate*, 378 U. S. 546 (1964). Prisoners have also been held to retain the right to be free from cruel and unusual punishment, e.g., *Wright* v. *McMann*, 387 F. 2d 519 (2nd Cir. 1967), and from unreasonable searches and seizures, e.g., *Hayes* v. *United States*, 367 F. 2d 216 (10th Cir. 1966). Prisoners are entitled to adequate medical care, as that is included within the rubric of due process of law, e.g., *Edwards* v. *Duncan*, 355 F. 2d 993 (4th Cir. 1966); *Coleman* v. *Johnston*, 247 F. 2d 273 (7th Cir. 1957). This Court implicitly recognized the rights of prisoners to be protected against self-incrimination in the recent case of *Mathis* v. *United States*, 391 U. S. 1 (1968).

In the area of racial discrimination, this Court and lower federal courts have held that the equal protection clause forbids arbitrary discrimination in the treatment of prisoners. See, e.g., *Lee* v. *Washington*, *supra*; *Toles* v. *Katzenbach*, 385 F. 2d 107 (9th Cir. 1967); *Rivers* v. *Royster*, 360 F. 2d 592 (4th Cir. 1966). And, of course, there is a long line of cases, to be discussed *infra*, beginning with this Court's decision in *Ex parte Hull*, 312 U. S. 546 (1941), guaranteeing prisoners the right of access to the courts.

The broad range of protected rights in these cases supports the "retained rights" doctrine.[4] Further, it is clear

---

[4] A retained rights theory protecting freedom of speech is not only constitutionally required, it is effective penology. As the President's Crime Commission Task Force on Corrections found:

that when such rights conflict with the claims of internal prison administration, the courts cannot adopt a "hands off"[5] attitude but must intervene to protect constitutional rights. See, e.g., Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985 (1962); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Prisoners*, 72 Yale L. J. 506 (1963).

If, therefore, prisoners retain the rights of ordinary citizens, they must retain the most precious of those rights, that of freedom of expression. Prison officials should not be allowed to employ "requirements of prison discipline

---

". . . a first principle for any correctional institution is that staff control can be greatest, and certainly inmate life will be most relevant to that in the free community, if rules regulating behavior are as close as possible to those which would be essential for law and order in any free community, together with such minimal additional rules as are necessary to meet the conditions peculiar to the institution." *Task Force Report*, at p. 50.

[5] Using language in *Price* v. *Johnston*, *supra*, the Federal courts have fashioned a so-called "hands off" doctrine by which they refuse to intervene in matters involving prison discipline. Under varying circumstances, "hands off" has not been permitted to interfere with consideration of prisoner allegations of deprivation of rights. A number of standards have been applied to determine whether a court will take cognizance of a prisoner's complaint. Some of the standards employed have been: an alleged violation of a legal right by an abuse of discretion by prison officials, *Fulwood* v. *Clemmer*, *infra*, at p. 375; an alleged violation of a constitutional right, *United States ex rel. Cleggett* v. *Pate*, 229 F. Supp. 818, 819 (N. D. Ill. 1964); "extreme circumstances," *Lee* v. *Tahash*, 352 F. 2d 970 (8th Cir. 1965); *Childs* v. *Pegelow*, 321 F. 2d 487, *cert. denied* 376 U. S. 932 (1964); "unreasonable regulations," *United States ex rel. Morris* v. *Radio Station WENR*, 209 F. 2d 105, 107 (7th Cir. 1953), *Lockhart* v. *Prasse*, 250 F. Supp. 529, 531 (E. D. Pa. 1965); "only in a rare and exceptional situation," *Carey* v. *Settle*, 351 F. 2d 483, 485 (7th Cir. 1965).

If a "retained rights" theory is accepted, then the courts must intervene when such rights are threatened or denied.

and security" to abridge this preferred right. Note, *The Rights of Prisoners While Incarcerated,* 15 Buffalo L. Rev. 397, 424 (1965). Cf. *NAACP* v. *Button,* 371 U. S. 415 (1963).

The belief that democracy depends upon a "free market-place of ideas" is no less valid within the prison setting than in the community at large. Most prisoners, even those sentenced to life terms, will eventually return to take their place in society. In the otherwise restricted society in which they exist, the need for a free exchange of ideas is all the more important to hopes of their rehabilitation. To this end, communication between prisoners and the outside world, and the exchange of ideas among inmates, should be encouraged, not forbidden.[6] See, e.g., Barnes and Teeters, *New Horizons in Criminology* 492 (3rd ed. 1959), Amer. Correctional Assn., *Manual of Correctional Standards* 400 (1959), Cloward, "Social Control in the Prison," in *Theoretical Studies in Social Organization of the Prison,* 20, 25-27 (Conference Group on Correction Organization 1960).

The petitioner in this case engaged in activity which clearly would have come within the protection of the First Amendment had he been an ordinary citizen. He spoke with fellow prisoners and discussed the cause of their imprisonment. When illiterate fellow prisoners believed their convictions to be unconstitutional, petitioner prepared papers containing a summary of facts of those convictions and the papers were sent to various courts as petitions for habeas corpus.

---

[6] Petitioner was punished not only because he prepared writs for other prisoners, but also because he "encouraged" others to prepare writs (A. 26).

If petitioner were not a prisoner, he would have been completely free to engage in the activity in question.[7] Under the retained rights theory, he should be similarly free unless his activity created a clear and present danger of some substantial evil which the state had a legitimate interest in preventing. See *Schenck* v. *United States*, 249 U. S. 47 (1919). Restrictions on prisoner speech can, therefore, only be justified where prison officials can demonstrate that there is a clear and present danger that the speech sought to be regulated would cause, or be likely to cause, disruption, violence, or a substantial breach of prison security. *Long* v. *Parker*, 390 F. 2d 816, 822 (3rd Cir. 1968). See e.g., *Cooper* v. *Pate*, 382 F. 2d 518 (7th Cir. 1968). Note, *The Right of Expression in Prison*, 40 So. Cal. L. Rev. 407, 420-22 (1967).[8]

Under this test it cannot be said that petitioner's action in speaking with and assisting untutored and illiterate fellow inmates with legal problems created a clear and present danger of breach of prison security or the orderly functioning of the institution. Certainly there is no such showing in the record of this case. The activity in which petitioner engaged was expression protected by the First and Fourteenth Amendments (Cf. *NAACP* v. *Button, supra*) and the regulation in question must be found invalid as an unconstitutional infringement of those rights.

---

[7] Respondents contention that petitioner's actions constituted the unauthorized practice of the law is briefed in petitioner's brief.

[8] The clear and present danger test has also been applied to regulations interfering with the exercise of religion in Black Muslim cases, e.g., *Cooper* v. *Pate*, 382 F. 2d 518 (7th Cir. 1968); *Banks* v. *Havener*, 234 F. Supp. 27, 30 (E. D. Va. 1964).

II.

The regulations in question violate due process of law and the Privileges and Immunities Clause by denying access to the courts to those unable to prepare their own papers.

The right of free access to the courts is a right which may not be withdrawn by legislation or regulation. It is one of the Privileges and Immunities enumerated in the *Slaughterhouse Cases*, 21 L. Ed. 394, 409. "It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious." *Coleman* v. *Peyton*, 362 F. 2d 905, 907 (4th Cir.), *cert. denied*, 385 U. S. 905 (1966). It is in fact the right upon which all others depend. If a prisoner cannot secure a judicial hearing, his other rights are illusory. *Stiltner* v. *Rhay*, 322 F. 2d 314, 316 (9th Cir. 1963). Comment *The Rights of Prisoners While Incarcerated*, 15 Buffalo L. Rev. 397, 414 (1965); Note, *Constitutional Rights of Prisoners; The Developing Law*, 110 U. Pa. L. Rev. 985, 987-92 (1962).

Access to the courts is also required to vindicate the right to petition for habeas corpus. As this Court acknowledged

> "... the writ of habeas corpus is the precious safeguard of personal liberty, and there is no higher duty than to maintain it unimpaired." *Bowen* v. *Johnston*, 306 U. S. 19, 26 (1939).

And "when an equivalent right is granted by a state" any regulation or barrier which tends to inhibit the availability

of the remedy must be scrutinized with equal care. See *Smith* v. *Bennett*, 365 U. S. 708, 713 (1961).

Beginning with this Court's decision in *Ex parte Hull*, 312 U. S. 546 (1941), courts have scrupulously examined prison regulations or procedures which have the effect of suspending the writ of habeas corpus. In *Hull*, this Court struck down a prison rule requiring that all habeas petitions be approved by a legal officer of the parole board before being forwarded to the proper court.

Lower courts have similarly scrutinized rules which effectively interfere with free access to the Court. See, e.g., *Spires* v. *Dowd*, 271 F. 2d 659 (7th Cir. 1959) (warden's order on request of state judge forbidding prisoner to correspond with either judge or clerk of state court struck down), *Hymes* v. *Dickson*, 232 F. Supp. 796 (N. D. Cal. 1964) (prisoners should not have to answer to authorities for allegations in complaints addressed to courts), *People* v. *Superior Court*, 273 F. 2d 936 (Cal. Dist. Ct. App. 1954) (prison authorities must forward petitions to court no matter how false the allegations contained therein). See also *DeWitt* v. *Pail*, 366 F. 2d 682 (9th Cir. 1966); *Coleman* v. *Peyton, supra; Edwards* v. *Duncan, supra; Lee* v. *Tahash*, 352 F. 2d 970 (8th Cir. 1965); *U. S. ex rel. Wakely* v. *Commonwealth of Penna.*, 247 F. Supp. 7 (E. D. Pa. 1965).

The right of access to the courts has been necessarily broadened to include the right to correspond with counsel about parole or violation of an inmate's rights, e.g., *Fulwood* v. *Clemmer*, 206 F. Supp. 370, 376 (D. D. C. 1962), including the right to communicate derogatory or critical statements about prison officials to counsel. *In re Ferguson*, 55 Cal. 2d 663, 677, 361 P. 2d 417, 425, *cert. denied*, 368

U. S. 864 (1961). Correspondingly, prison officials may not interfere with correspondence designed to secure legal assistance, *McCloskey* v. *State of Maryland*, 337 F. 2d 72, 74-75 (4th Cir. 1964).

Thus the Courts must factually examine each situation to determine whether prisoners possess effective means to vindicate their right of access to the courts. In the instant case, such access is openly denied by the regulation in question. To prohibit untutored or illiterate prisoners from obtaining the aid of fellow prisoners in writing letters or legal papers is, in the absence of specific provision for other assistance, as much a denial of access to the courts as the unqualified refusal to mail all legal papers. It is, as the District Court found, " . . . the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests or petitions of their day in Court." *Johnson* v. *Avery*, 252 F. Supp. 783, 784 (M. D. Tenn. 1966). As such, the regulation must be struck down.

III.

The regulation in the instant case is a violation of Article 1, Section 9, of the United States Constitution and of the equal protection of the laws.

Art. I, Sec. 9, Clause 2, of the Constitution provides that

> "The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

This provision applies not only to overt legislative attempts to abolish the writ, but to laws or regulations which have the effect of making the writ unavailable. Such laws or regulations need not work a universal suspension, but need only have the effect of limiting or withdrawing the writ from some group or class of persons who would otherwise be entitled to exercise their rights to habeas corpus.

In *Sanders* v. *United States*, 373 U. S. 1, 11-12, fn. 6 (1963), this Court suggested that to apply a strict rule of *res judicata* to habeas corpus would be an unconstitutional suspension of the writ, at least for those prisoners whose claims had already been presented to the courts. Similarly, 28 U. S. C. §2255 could only be upheld by finding it equivalent in scope to habeas corpus, and therefore no suspension of the writ. *United States* v. *Hayman*, 342 U. S. 205, 209 (1952). And to place financial barriers between indigent prisoners and the exercise of the writ would also work an unconstitutional suspension. Cf. *Smith* v. *Bennett*, *supra*, at p. 712.

In *Smartt* v. *Avery*, 370 F. 2d 788 (6th Cir. 1967), a regulation of the state parole board which in effect postponed for a year parole consideration for any prisoner who filed an unsuccessful petition for habeas corpus was held to violate article 1, sec. 9, clause 2.

A regulation which totally bars illiterate prisoners from filing petitions or otherwise seeking outside aid for filing petitions has the effect of suspending the writ of habeas corpus for those prisoners. As such, the regulation in the instant case is also a violation of article 1, section 9, clause 2, and cannot stand.

The regulation in question is also a denial of the equal protection of the laws. Where an identifiable group is discriminated against, denying that group rights or privileges available to others, equal protection is violated. See, e.g., *Peterson* v. *City of Greenville*, 373 U. S. 244 (1963) (state action enforcing segregation on the basis of race); *Baker* v. *Carr*, 369 U. S. 186 (1962) (state failure to reapportion legislature). Thus, this Court held, a rule denying full appellate review to a prisoner who could not afford to purchase a transcript is a violation of equal protection. *Griffin* v. *Illinois*, 351 U. S. 12 (1956). See *Burns* v. *Ohio*, 360 U. S. 252 (1959) (filing fee for criminal defendant to docket motion for leave to appeal).

It is clear that in the process involving the determination of guilt or innocence, or the alleged violation of constitutional rights, a state may no more discriminate on the basis of poverty than of race, religion, or color. *Griffin* v. *Illinois*, *supra*, at p. 17. Discrimination on the basis of

illiteracy, or other physical or mental inability[9] to prepare an adequate petition to the courts, such as that worked by the Tennessee regulation at bar, is an equally impermissible denial of equal protection.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

Respectfully submitted,

MELVIN L. WULF
156 Fifth Avenue
New York, N. Y.

KRISTIN GLEN
30 East 42nd Street
New York, N. Y.

Attorneys for Amici Curiae

September 1968

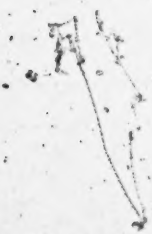
---

[9] Prisoners need not be wholly illiterate to be incapable of preparing writs, although statistics show that prison populations contain a much higher percentage of illiterates than the national population as a whole. See Note, *Prison "No-Assistance" Regulations and the Jailhouse Lawyers*, 1968 Duke L. J. 343, 348 fn. 23. A relatively large number of prisoners may also be mentally defective or retarded, and similarly unable to prepare their own papers. Id., at p. 348, fn. 24. And even those inmates with "normal" intelligence may be totally incapable of ascertaining what facts are relevant in showing constitutional violations, and therefore of drawing up even minimally acceptable writs. See Krause, *A Lawyer Looks at Writ-Writing*, 56 Cal. L. Rev. 371, 374 (1968).

INDEX.

Cases Cited.

Statutes Cited.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1195.

WILLIAM JOE JOHNSON,
Petitioner,

vs.

HARRY S. AVERY, Commissioner, Department of Correction, et al.,
Respondent.

SUPPLEMENTAL REPLY TO PETITION FOR CERTIORARI.

Counsel for the respondent in this cause requests permission to file this supplemental brief for the purpose of further analyzing and discussing the legal problems involved.

QUESTIONS PRESENTED.

Counsel for the petitioner has presented three questions in his brief:

(1) Whether or not a state prison regulation which prohibits a prisoner from assisting a fellow inmate in

preparing a petition for writ of habeas corpus is invalid because of Section 28 U. S. C. 2242;

(2) Whether or not such a prison regulation prohibiting one inmate from assisting another inmate in preparing habeas corpus petitions contravenes the due process and equal protection clauses, 14th Amendment, Constitution of the United States; and,

(3) Whether or not a Federal District Judge may, by the issuance of a writ of habeas corpus, prevent prison officials from enforcing disciplinarian measures against a prisoner for violation of prison regulations which are contrary to the Federal constitution and Federal statutes.

ARGUMENT.

The latter of these three questions, of course, is easy to eliminate. Counsel for the respondent agrees that a Federal District Judge may prohibit, by the writ of habeas corpus, disciplinarian measures by state prison officials against prisoners who have violated prison regulations when such regulations conflict with the Federal law once it has been determined that such regulations are in violation of Federal rights.

Counsel for the state also thinks that the first question is not too difficult to eliminate. Section 28 U. S. C. 2242 is no authority for a prisoner to prepare or draft a habeas corpus petition for a fellow prisoner nor to advise a fellow inmate on the subject. This section of the Federal Code provides that application for writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended or by someone acting in his behalf. It was held by the District Judge that the words "or by someone acting in his behalf" constitute authority for one prison inmate to prepare a habeas corpus petition for a fellow prisoner and this position is strongly insisted upon in the brief of counsel for the petitioner.

With deference to the District Judge and opposing counsel, the statute under consideration is not such authority. As a matter of fact, the statute does not deal with the preparation of applications for writ of habeas corpus, it only provides that such application must be in writing and verified and this must be done by the applicant or some person acting in his behalf. Signing the petition and verifying it is nothing more than a ministerial act. "Jailhouse Lawyers" or "Writ Writers" do not confine themselves to these ministerial acts. They compose the petition or combination petition and brief, and it must be a matter of common knowledge that they allege matters

the inmate for whom it is prepared never heard about or even dreamed of until he is asked about them at a hearing on the petition.

Even if the statute were authority for someone acting in behalf of the petitioner to prepare and draft the petition, it is not authority for anyone to act in his behalf. Congress in the enactment of this statute must have contemplated the "some person acting in his behalf" to be some person otherwise qualified or authorized to so act.

DISCUSSION OF MAIN QUESTION.

The main question presented by the petitioner is whether or not a restriction upon his right to prepare a habeas corpus petition for a fellow inmate amounts to a denial of due process of law or an infringement upon the right of free speech; and, if the prison regulation denying this right is valid whether or not the segregation of the petitioner from other prisoners as a means of punishment or preventing his violation of the regulation is unreasonable. The State submits that both of these questions are most interesting and both are serious questions. There is authority, of course, for one person to file a habeas corpus petition for another. **Rosenberg v. United States**, 346 U. S. 273, 73 S. Ct. 1152, 97 L. Ed. 2d 1607, cited in opposing counsel's brief, is authority for a lawyer to prepare a habeas corpus petition in behalf of another person. **United States ex rel. Accardi v. Shaughnessy**, 347 U. S. 260, 74 S. Ct. 499, 98 L. Ed. 681, is authority for such a petition to be filed by a prisoner's wife, and **United States ex rel. Toth v. Quarles**, 350 U. S. 11, 76 S. Ct. 1, 100 L. Ed. 8, is authority for such a petition to be filed by a prisoner's sister. These cases are also cited in petitioner's brief. Also cited in petitioner's brief is the case of **Smith v. Bennett**, 365 U. S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39, wherein it was held that requiring a filing fee by an indigent prisoner violated the equal protection clause, 14th

Amendment, Federal Constitution. **Ex parte Hull**, 312 U. S. 546, 61 S. Ct. 823, 85 L. Ed. 1034, and other authorities cited in opposing counsel's brief, make clear that a state and its officers may not unusually abridge or impair petitioner's right to apply to Federal Court for a writ of habeas corpus.

To determine the reasonableness of a regulation, of course, all factors must be taken into consideration. The one factor present in this case that was not present in the foregoing cases is the effect upon the morale of prisoners resulting from the activities of "Jailhouse Lawyers and Writ Writers" if allowed to operate unrestricted or if allowed to operate at all. What amounts to due process in any case depends upon the circumstances. In **Bradford v. School District No. 20**, 244 F. Supp. 768, 773, it was said:

> "What constitutes 'due process' within the meaning of the Fourteenth Amendment cannot be precisely defined. It must be decided in the light of that which is just and reasonable, considering all factors, and cannot unduly confine those officials who have the responsibility of governing. As stated by Mr. Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 163, 71 S. Ct. 624, 644, 95 L. Ed. 817 (1951):
>
> > 'The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.'"

Of course, the right of free speech is not an absolute right as has been held by this Court in numerous cases,

Frahwerk v. United States, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561; **Schenck v. United States**, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470; **Kasper v. Brittian**, 245 Fed. 2d 92, rehearing denied petition for certiorari, 355 U. S. 886, 78 S. Ct. 147, 2 L. Ed. 2d 115.

In considering this question, the Federal District Judge held:

> "for all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer', their possibly valid constitutional claims will never be heard in any court. At stake, then, is not only the claim of the instant petitioner, but more importantly, under the broad terms of the regulation, the practical denial to an indeterminate number of prisoners who are incapable of preparing their own requests of petitions of their day in court. Without some assistance, their right to habeas corpus in many instances becomes empty and meaningless. It is within this framework that we must examine the instant petition." Appendix 44.

The United States Circuit Court of Appeals, Fifth Circuit, disagreed with the Federal District Court in these words:

> "the District Court further held that unless petitioner could continue to serve as a 'writ writer' or 'jail-house lawyer' for his fellow inmates, their constitutional rights to the effective aid of habeas corpus would be endangered since 'without the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter, or request.' We must disagree with both of these conclusions." Appendix 92.

The evidentiary basis for the opinion of either Court does not appear in the record. Apparently both courts

drew their conclusions from their own experiences. There is nothing in the record to support a finding one way or the other. In **Hatfield v. Bailleaux,** 290 Fed. 2d 632 (9th Circuit), this was said on the subject:

> "there is no finding that appellants have been denied all access to the courts. There is no finding that by reason of any prison regulation or practice pertaining to the preparation, service and filing of such pleadings or documents, or to the sending and receiving of such communications, any appellee has ever lost the right to commence, prosecute, defend or appeal in any court proceeding involving personal liberty. Nor is there any finding that by reason of prison regulations and practices any appellee has been substantially delayed in obtaining a judicial determination in any such court proceeding.
> In the absence of findings of this kind it is difficult to see how there could possibly be warrant for the conclusion that appellees have been deprived of reasonable access to the courts."

Likewise the record is void of evidence to indicate what effect allowing jail-house lawyers and writ writers to go unrestricted would have upon the prison morale.

The United States Court of Appeals found that there was evidence in **Hatfield v. Bailleaux,** supra, showing the harmful effects upon the morale of prisoners by cell-house lawyers which it seemingly approved although there was no finding on the question by the District Court in that case. An excerpt from page 639 of the Hatfield case is as follows:

> "While the court did not enter findings as to the purpose of these regulations and practices, the evidence is undisputed as to those purposes. Most of these regulations and practices are for the purpose of discouraging the informal practice of law by what

were termed 'cell-house lawyers'. Prison officials testified that if permitted to engage in such practice, aggressive inmates of superior intelligence exploit and dominate weaker prisoners of inferior intelligence. The practice also tends to develop a group of inmate leaders, which is discouraged in all institutions."

An observation made in a concurring opinion in the case of **Weller v. Dickson**, 314 Fed. 2d 598, 602, on the subject, is as follows:

> "We know from sad experience with habeas corpus and 2255 cases that imprisoned felons are seldom, if ever, deterred by the penalties of perjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court. The prospect of amercing their jailers in damages must be a most tempting one, even if it will not get them their freedom. The disruption of prison discipline that the maintenance of such suits, at government expense, can bring about, is not difficult to imagine. Particularly since Monroe v. Pape, 1961, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, it has become apparent that the 'jailhouse lawyers' think that they have a new bonanza in the Civil Rights Act."

The Federal Bureau of Prisons must have known of the discipline problems that arise when one inmate of a prison assists another inmate in habeas corpus petitions, for it has directed the warden of the Federal prison to issue general rules prohibiting the practice. In **White v. Blackwell**, 277 F. S. 211, the Court recognized that such a directive had been given to the warden of the Federal prison by the Bureau of Federal Prisons.

From the foregoing it does not appear that prohibiting one inmate from preparing habeas corpus petitions for

a fellow inmate by prison authorities unreasonably hampers inmates from gaining access to the courts, but on the other hand it is a practice which tends to undermine discipline in the prison to the extent that many prison authorities, both State and Federal, have found it necessary to eliminate or prohibit the practice. It is said in the brief of opposing counsel that the preparation of such petitions is within the supervision of the court and that the court is in a position to prevent abuses and limit the consequences. Of course, this might be one way of handling the problem but it is insisted that it would not be as effective as preventing the practice and it would not eliminate the necessity for the courts and lawyers to spend a tremendous amount of time going through long petitions written by persons not deterred by the penalties of perjury according to **Weller v. Dickson,** supra. The petitioner in this case has filed a number of habeas corpus petitions for himself one of which contained 45 pages (Tr. 38-41).

The final question to be considered is whether or not the procedure for preventing the petitioner from aiding another inmate in the preparation of petitions is reasonable. From his own testimony it is evident that he does not intend to restrict himself from drawing such petitions as long as he is permitted to associate with other prisoners. His counsel at the trial level made this statement:

> "Does not intend and I don't think, if Your Honor please, that he should be made to quit drawing them up. I think he fully intends, if he keeps out, to keep on drawing them up if he can be furnished the materials, because I think he's entitled to do so, and entitled to have access through these petitions to the Court" (Tr. 41-42).

The record further indicates that the petitioner has agreed on numerous occasions not to write more petitions

for habeas corpus for fellow inmates but as soon as permitted to associate with other prisoners he immediately started anew.

If the practice is one that is within the authority of the prison authorities to eliminate them, it appears from the attitude of the petitioner that the only way to prevent his assisting other inmates is to prevent his association with them. Of course, materials for filing petitions could be kept from the petitioner but this would have the effect of denying him access to the court, and the state of Tennessee, of course, recognizes that the petitioner cannot be constitutionally denied access to the Court.

The record does not indicate the number of prisoners in the State Penitentiary, but this court can judicially know that there are many prisoners in most prisons throughout the United States. The alternative to separating the "Writ Writers" from the other prisoners would be to exercise sufficient surveillance over the other numerous prisoners to see that they do not receive assistance in the preparation of habeas corpus petitions. This would involve a great deal of restriction upon the rights of the other prisoners and it would require a huge increase in prison personnel thus increasing the tax burden for all taxpayers. It would also reduce the opportunity for prison authorities and personnel to use their energies and resources to do things constructive toward the rehabilitation of the prisoners committed to their custody.

Respectfully submitted,

THOMAS E. FOX,
Deputy Attorney General,
Supreme Court Building,
Nashville, Tennessee 37219,
Attorney for Respondent.

Certificate of Service.

I certify that a copy of the foregoing Supplemental Reply to Petition for Certiorari of the State has been furnished to Mr. Karl P. Warden, Vanderbilt University Law School, Nashville, Tennessee, and to Mr. Pierce Winningham, Attorney at Law, Nashville, Tennessee, this the 29 day of October, 1968.

Thomas E. Fox,
Deputy Attorney General.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1968.

William Joe Johnson, Petitioner, v. Harry S. Avery, Commissioner of Correction, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1969.]

Mr. Justice Fortas delivered the opinion of the Court.

I.

Petitioner is serving a life sentence in the Tennessee State Penitentiary. In February 1965 he was transferred to the maximum security building in the prison for violation of a prison regulation which provides:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs."

In July 1965, petitioner filed in the United States District Court for the Middle District of Tennessee a "motion for law books and a typewriter," in which he sought relief from his confinement in the maximum security building. The District Court treated this motion as a petition for a writ of habeas corpus and, after a hearing, ordered him released from disciplinary confinement and restored to the status of an ordinary

prisoner. The District Court held that the regulation was void because it in effect barred illiterate prisoners from access to federal habeas corpus and conflicted with 28 U. S. C. § 2242.[1] 252 F. Supp. 783.

By the time the District Court order was entered, petitioner had been transferred from the maximum security building, but he had been put in a disciplinary cell block in which he was entitled to fewer privileges than were given ordinary prisoners. Only when he promised to refrain from assistance to other inmates was he restored to regular prison conditions and privileges. At a second hearing, held in March 1966, the District Court explored these issues concerning the compliance of the prison officials with its initial order. After the hearing, it reaffirmed its earlier order.

The State appealed. The Court of Appeals for the Sixth Circuit reversed, concluding that the regulation did not unlawfully conflict with the federal right of habeas corpus. According to the Sixth Circuit, the interest of the State in preserving prison discipline and in limiting the practice of law to licensed attorneys justified whatever burden the regulation might place on access to federal habeas corpus. 382 F. 2d 353.

II.

This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme,[2] and the Congress has demonstrated its solicitude for the vigor of the Great Writ.[3] The Court has steadfastly insisted that "there is no higher duty than to maintain it unimpaired." *Bowen v. Johnston*, 306 U. S. 19, 26 (1939).

---

[1] 28 U. S. C. § 2242 provides in part: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

[2] *E. g., Fay* v. *Noia*, 372 U. S. 391 (1963).

[3] 28 U. S. C. §§ 2241–2255.

Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed. For example, the Court has held that a State may not validly make the writ available only to prisoners who could pay a $4 filing fee. *Smith* v. *Bennett*, 365 U. S. 708 (1961). And it has insisted that, for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than a formality. For instance, the State is obligated to furnish prisoners not otherwise able to obtain it, with a transcript or equivalent recordation of prior habeas hearings for use in further proceedings. *Long* v. *District Court*, 385 U. S. 192 (1966). Cf. *Griffin* v. *Illinois*, 351 U. S. 12 (1956).

Tennessee urges, however, that the contested regulation in this case is justified as a part of the State's disciplinary administration of the prisons. There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights, the regulations may be invalidated.

For example, in *Lee* v. *Washington*, 390 U. S. 333 (1968), the practice of racial segregation of prisoners was justified by the State as necessary to maintain good order and discipline. We held, however, that the practice was constitutionally prohibited, although we were careful to point out that the order of the District Court, which we affirmed, made allowance for "the necessities of prison security and discipline." *Id.*, at 334. And in *Ex parte Hull*, 312 U. S. 546 (1941), this Court invalidated a state regulation which required that habeas

corpus petitions first be submitted to prison authorities and then approved by the "legal investigator" to the parole board as "properly drawn" before being transmitted to the court. Here again, the State urged that the requirement was necessary to maintain prison discipline. But this Court held that the regulation violated the principle that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U. S., at 549. Cf. *Cochran* v. *Kansas*, 316 U. S. 255, 257 (1942).

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that. The District Court concluded that "For all practical purposes, if such prisoners cannot have the assistance of a 'jailhouse lawyer' their possibly valid constitutional claims will never be heard in any court." 252 F. Supp., at 784. The record supports this conclusion.

Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.[4] This appears to be equally true of Tennessee's prison facilities.[5]

In most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing. *E. g.*,

---

[4] See Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343, 347–348, 360–361.

[5] Tennessee Department of Correction, Departmental Report: Fiscal Years 1965–1966, 1966–1967.

Taylor v. Pegelow, 335 F. 2d 147 (C. A. 4th Cir. 1964); *United States ex rel. Marshall v. Wilkins*, 338 F. 2d 404 (C. A. 2d Cir. 1964). See 28 U. S. C. § 1915 (d); Sokol, A Handbook of Federal Habeas Corpus 71–73 (1965).[6]

It has not been held that there is any general obligation of the courts, state or federal, to appoint counsel for prisoners who indicate, without more, that they wish to seek post-conviction relief. See, *e. g.*, *Barker v. Ohio*, 330 F. 2d 594 (C. A. 6th Cir. 1964). Accordingly, the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain within the prison walls or the prison system. In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access to the courts unless such help is available.

It is indisputable that prison "writ writers" like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them.[7] But, as this Court held in *Ex parte Hull*, *supra*, in declaring invalid a state prison regulation which required that prisoners' legal pleadings be screened by state officials:

> "The considerations that prompted [the regulation's] formulation are not without merit, but the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U. S., at 549.

Tennessee does not provide an available alternative to the assistance provided by other inmates. The war-

[6] Tennessee's post-conviction procedure provides for appointment of counsel "if necessary." Tenn. Code 40-3821, 2019.

[7] See, *e. g.*, Spector, A Prison Librarian Looks at Writ-Writing, 56 Calif. L. Rev. 365 (1968).

den of the prison in which petitioner was confined stated that the prison provided free notarization of prisoners' petitions. That obviously meets only a formal requirement. He also indicated that he sometimes allowed prisoners to examine the listing of attorneys in the Nashville telephone directory so they could select one to write to in an effort to interest him in taking the case, and that "on several occasions" he had contacted the public defender at the request of an inmate. There is no contention, however, that there is any regular system of assistance by public defenders. In its brief the State contends that "[t]here is absolutely no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf," but there is no contention that they have in fact ever done so.

This is obviously far short of the showing required to demonstrate that, in depriving prisoners of the assistance of fellow inmates, Tennessee has not, in substance, deprived those unable themselves, with reasonable adequacy, to prepare their petitions, of access to the constitutionally and statutorily protected availability of the writ of habeas corpus. By contrast, in several States,[8] the public defender system supplies trained attorneys, paid from public funds, who are available to consult with prisoners regarding their habeas petitions. At least one State employs senior law students to interview and advise inmates in state prisons.[9] Another

[8] Note, *supra*, note 4, at 349, n. 27, at 359. See also W. Rosenmoore & S. Koenigsberg, Habeas Corpus and the Indigent Prisoner, 11 Rutgers L. Rev. 611, 619-622 (1957).

[9] At the time of the second hearing in petitioner's case, the warden testified, the State was considering setting up a program under which senior law students from Vanderbilt Law School would assist prisoners in the preparation of post-conviction relief applications. For whatever it may be worth, petitioner testified that he would stop helping other inmates if such a system were in existence.

State has a voluntary program whereby members of the local bar association make periodic visits to the prison to consult with prisoners concerning their cases.[10] We express no judgment concerning these plans, but their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates.

Even in the absence of such alternatives, the State may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief: for example, by limitations on the time and location of such activities and the imposition of punishment for the giving or receipt of consideration in connection with such activities. Cf. *Hatfield* v. *Bailleaux*, 290 F. 2d 632 (C. A. 9th Cir. 1961) (sustaining as reasonable regulations on the time and location of prisoner work on their own petitions). But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here in issue, barring inmates from furnishing such assistance to other prisoners.[11]

---

[10] One State has designated an inmate as the official prison writ-writer. See Note, *supra*, note 4, at 359.

[11] In reversing the District Court, the Court of Appeals relied on the power of the State to restrict the practice of law to licensed attorneys as a source of authority for the prison regulation. The power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights. *NAACP* v. *Button*, 371 U. S. 415 (1963); *Sperry* v. *Florida*, 373 U. S. 379 (1963). In any event, the type of activity involved here—preparation of petitions for post-conviction relief—historically and traditionally is one which may benefit from the services of a trained and dedicated lawyer, but it is a function often, perhaps generally, performed by laymen. Title 28 U. S. C. § 2242, apparently contemplates that in many situations petitions for federal habeas corpus relief will be prepared by laymen.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1968.

William Joe Johnson, Petitioner, v. Harry S. Avery, Commissioner of Correction, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1969.]

Mr. Justice Douglas, concurring.

While I join the opinion of the Court, I add a few words in emphasis of the important thesis of the case.

The increasing complexities of our governmental apparatus both at the local and federal levels have made it difficult for a person to process a claim or even to make a complaint. Social security is a virtual maze; the hierarchy that governs urban housing is often so intricate that it takes an expert to know what agency has jurisdiction over a particular complaint; the office to call or official to see for noise abatement, for a broken sewer line, or a down tree is a mystery to many in our metropolitan areas.

A person who has a claim assertable in faraway Washington, D. C., is even more helpless, as evident by the increasing tendency of constituents to rely on their congressional delegation to identify, press, and process their claims.

We think of claims as grist of the mill for the lawyers. But it is becoming abundantly clear that more and more of the effort in ferreting out the basis of claims and the agencies responsible for them and in preparing the almost endless paperwork for their prosecution is work for laymen. There are not enough lawyers to manage or supervise all of these affairs; and much of the basic work done requires no special legal talent. Yet there is a closed-

shop philosophy in the legal profession that cuts down drastically active roles for laymen. It was expressed by a New York court in denying an application from the Neighborhood Legal Services for permission to offer a broad legal aid type of service to indigents:

> "... in any legal assistance corporation, supported by Federal antipoverty funds, the executive staff, and those with the responsibility to hire and discharge staff from the very top to the lowest lay echelon must be lawyers." Matter of Action for Legal Services, 26 App. Div. 354, 360 (1966).

That traditional, closed-shop attitude is utterly out of place in the modern world where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar.

> "If poverty lawyers are overworked, some of the work can be delegated to sub-professionals. New York law permits senior law students to practice law under certain supervised conditions. Approval must first be granted by the appellate division. A rung or two lower on the legal profession's ladder are laymen legal technicians, comparable to nurses and lab assistants in the medical profession. Large law firms employ them, and there seems to be no reason why they cannot be used in legal services programs to relieve attorneys for more professional tasks." Samore, Legal Services for the Poor, 32 Albany L. Rev. 509, 515–516 (1968). And see Sparer, Thorkelson, and Weiss, The Lay Advocate, 43 U. Det. L. J. 493, 510–514 (1966).

The New York program that is funded by the federal office of OEO and which as noted was first rejected by the New York courts, is called Community Action for Legal Services. It was finally approved by the New York courts with a board of directors of 20 lawyers and 10 laymen. N. Y. L. J. 1, 5 (1967).

The plight of a man in prison may in these respects be even more acute than the plight of a person on the outside. He may need collateral proceedings to test the legality of his detention[2] or relief against management of the parole system[3] or against defective detainers lodged against him which create burdens in the manner of his incarcerated status.[4] He may have grievances of a civil nature against those outside the prison. His imprisonment may give his wife grounds for divorce and be a factor in determining the custody of his children; and he may have pressing social security, workmen's compensation, or veterans' claims.[5]

While the demand for legal counsel in prison is heavy, the supply is light. For private matters of a civil nature, legal counsel for the indigent in prison is almost nonexistent. Even for criminal proceedings, it is sparse.[6] While a few States have post-conviction statutes providing such counsel,[7] most States do not.[8] Some States like California do appoint counsel to represent the indigent

---

[2] Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960).

[3] Hubanks & Linde, Legal Services to the Indigent Imprisoned, 23 Legal Aid Briefcase 214 (1965).

[4] Temis, Report on Postconviction Services to the County Prison, 25 Legal Aid Briefcase 18 (1966).

[5] Note, Prison "No Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343.

[6] Silverstein, Defense of the Poor in Criminal Cases in American State Courts: A Preliminary Summary (ABA 1964); Note, Legal Services for the Poor, 49 Mass. L. Q. 293 (1964); O. E. O. and the Legal Services—A Symposium, 14 Catholic Law. 92 (1968); Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514 (1967); Uelmen, Relief for Federal Prisoners, 69 W. Va. L. Rev. 277 (1967).

[7] Ill. Rev. Stat., c. 38, § 122–4 (1961); Ore. Rev. Stat. § 138.590 (1964).

[8] Note, Indigent's Right to Counsel in Criminal Post-Conviction Proceedings, 51 Calif. L. Rev. 96 (1963).

prisoner in his collateral hearings, once he succeeds in making out a prima facie case.[9] But as a result, counsel is not on hand for preparation of the papers or for the initial decision by the prisoner that his claim has substance.

Many think that the prisoner needs help at an early stage to weed out frivolous claims.[10] Some States have Legal Aid Societies, sponsored in part by the National Legal Aid and Defender Association, that provide post-conviction counsel to prisoners.[11] Most legal aid offices, however, have so many pressing obligations of civil and criminal nature in their own communities and among freedmen, as not to be able to provide any satisfactory assistance to prisoners.[12] The same thing is true of

---

[9] See, *e. g., State* v. *Shipman*, 62 Cal. 2d 226, 397 P. 2d 993, 42 Cal. Rptr. 1 (1965). Note, Indigent's Right to Counsel in Post-Conviction Collateral Proceedings in California, 13 U. C. L. A. L. Rev. 446 (1966).

[10] "Lawyers generally require at least a fifty dollar fee to travel to the prisons to consult with a prisoner. The ones not able to pay this sum must resort to the next best course of action—act as their own lawyers. The disadvantage to the prisoner are obvious. A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend a considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks—that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs." Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 345–346 (1968).

[11] Note, 49 Mass. L. Q. 293 (1964).

[12] Note, 76 Harv. L. Rev. 579 (1963); Note, 13 Stan. L. Rev. 522 (1961); Gardiner, Defects in the Present Legal Aid Service, 22

OEO-sponsored Neighborhood Legal Services offices, which see their function as providing legal counsel for a particular community, which a member leaves as soon as he is taken to prison.[13] In some cases, state public defenders will represent a man even after he passes beyond prison walls. But more often, the public defender has no general authorization to process post-conviction matters.[14]

Some States have experimented with programs designed especially for the prison community. The Bureau of Prisons led the way with a program of allowing senior law students to service the federal penitentiary at Leavenworth, Kansas. Since then, it has encouraged similar programs at Lewisburg (University of Pennsylvania Law School), and elsewhere. The program of the law school at U. C. L. A. is now about to reach inside federal prisons. In describing the University of Kansas Law School program at Leavenworth, legal counsel for the Bureau of Prisons has said:

> "The experience at Leavenworth has shown that there have been very few attacks upon the [prison] administration; that prospective frivolous litigation has been screened out and that where the law school felt that the prisoner had a good cause of action, relief was granted in a great percentage of cases. A large part of the activity was disposing of long outstanding detainers lodged against the inmates. In addition, the program handles civil matters such as domestic relations problems and compensation claims. Even where there has been no tangible suc-

---

Tenn. L. Rev. 505 (1951); Note, Prisoner Assistance on Federal Habeas Corpus Petitions, 19 Stan. L. Rev. 867 (1967).

[13] O. E. O. and the Legal Services—A symposium, 14 Catholic Law. 92 (1968).

[14] E. Mancuso, The Public Defender System in the State of California, 5 (1963).

cess, the fact that the inmate had someone on the outside listen to him and analyse his problems had a most beneficial effect . . . . We think that these programs have been beneficial not only to the inmates but to the students, the staff and the courts." [18]

The difficulty with an *ad hoc* program resting on a shifting law school population is that, worthy though it be, it often cannot meet the daily prison demands.[19] In desperation, at least one State has allowed a selected inmate to act as "jailhouse" counsel for the remaining inmates.[20] The way of legal aid, public defenders, and assigned counsel has been spread too thinly to service prisons adequately.[21] Some federal courts have begun to provide prisons with standardized habeas corpus forms, in the hope that they can be used by laymen.[22] But the prison population has not found that satisfactory.[23]

Where government fails to provide the prison with the legal counsel it demands, the prison generates its own. In a community where illiteracy and mental deficiency is notoriously high, it is not enough to ask the prisoner to be his own lawyer.[24] Without the

---

[18] Barkin, Impact of Changing Law Upon Prison Policy, 42 Prison J. 3 (1960). And see Application of Cornell Legal Clinic, 273 N. Y. S. 2d 444.

[19] Wilson, Legal Assistance Project at Leavenworth, 24 Legal Aid Briefcase 254 (1966).

[20] Note, 1968 Duke L. J. 343, 350.

[21] Note, Representation of Indigent Criminal Defendants in the Federal District Court, 76 Harv. L. Rev. 51 (1963); Note, Representation of Indigents in California—A Field Study of the Public Defender System and Assigned Counsel, 13 Stan. L. Rev. 522 (1961).

[22] A. Sokol, A Handbook of Federal Habeas Corpus 53–54, 192–200 (1965).

[23] Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 352 (1968).

[24] Note, 1968 Duke L. J. 343, 348–349.

assistance of fellow prisoners, some meritorious claims would never see the light of a courtroom. In cases where that assistance succeeds, it speaks for itself. And even in cases where it fails, it may provide a necessary medium of expression: [22]

> "It is not unusual, then, in a subculture created by the criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society. The upheavals occurring in the American social structure are reflected within the prison environment. Prisoners, having real or imagined grievances, cannot demonstrate in protest against them. The right peaceably to assemble is denied to them. The only avenue open to the prisoners is taking their case to court. Prison writ-writers would compare themselves to the dissenters outside prison . . . . Many writ-writers have said that they would be able to make positive plans for the future if they knew when their [indeterminate] sentences would end. They seem to feel that they are living in a vacuum where their fates are determined arbitrarily rather than by rule of law. One writ-writer very aptly summed up the majority's view with these words: 'When I arrived at the prison and discovered that no one, including the prison officials, knew how long my sentence was, I had to resort to fighting my case to keep my sanity.' Psychologically, the writ-writer, in seeking relief from the courts, is pursuing a course of action which relieves the tensions and anxieties created by the [indeterminate] sentence system." [23]

---

[22] Freund, Remarks—Habeas Corpus: Proposals for Reform, 9 Utah L. Rev. 18, 30 (1964).

[23] Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 347–348 (1968).

In that view, which many share, the preparation of these endless petitions within the prisons is a useful form of therapy. Apart from that, their preparation must never be considered the exclusive prerogative of the lawyer. Laymen—in and out of prison—should be allowed to act as "next of friend" to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar.

The cooperation and help of laymen, as well as of lawyers, is necessary if the right of "reasonable access to the courts" [24] is to be available to the indigents among us.

---

[24] "Reasonable access to the courts is . . . a right [secured by the Constitution and laws of the United States], being guaranteed as against state action by the due process clause of the fourteenth amendment. In so far as access by state prisoners to federal courts is concerned, this right was recognised in *Ex parte Hull*, 312 U. S. 546, 549. The right of access by state prisoners to state courts was recognised in *White* v. *Ragen*, 324 U. S. 760, 762, n. 1." *Hatfield* v. *Bailleaux*, 290 F. 2d 632, 636 (C. A. 9th Cir. 1961).

SUPREME COURT OF THE UNITED STATES

No. 40.—October Term, 1968.

William Joe Johnson, Petitioner, v. Harry S. Avery, Commissioner of Correction, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1969.]

Mr. Justice White, with whom Mr. Justice Black joins, dissenting.

It is true, as the majority says, that habeas corpus is the Great Writ, and that access through it to the courts cannot be denied simply because a man is indigent or illiterate. It is also true that the illiterate or poorly educated and inexperienced indigent cannot adequately help himself and that unless he secures aid from some other source he is effectively denied the opportunity to present to the courts what may be valid claims for post-conviction relief.

Having in mind these matters, which seem too clear for argument, the Court rules that unless the State provides a reasonably adequate alternative, it may not enforce its rule against inmates furnishing help to others in preparing post-conviction petitions. The Court does not say so in so many words, but apparently the extent of the State's duty is not to interfere with indigents seeking advice from other prisoners. It seems to me, however, that unless the help the indigent gets from other inmates is reasonably adequate for the task, he will be as surely and effectively barred from the courts as if he were accorded no help at all. It may be that those who could help effectively refuse to do so because the indigent cannot pay, that there is actually no fellow inmate who is competent to help, or that the realities of prison life leave the indigent to the mercies of those

who should not be advising others at all. In this event the problem of the incompetent needing help is only exacerbated as is the difficulty of the courts in dealing with a mounting flow of inadequate and misconceived petitions.

The majority admits that jailhouse lawyers like petitioner "are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them is indisputable." That is putting it mildly. The disciplinary problems are severe, the burden on the courts serious, and the disadvantages to prisoner clients of the jailhouse lawyer are unacceptable.

Although some jailhouse lawyers are no doubt very capable, it is not necessarily the best amateur legal minds which are devoted to jailhouse lawyering. Rather, the most aggressive and domineering personalities may predominate. And it may not be those with the best claims to relief who are served as clients, but those who are weaker and more gullible. Many assert that the aim of the jailhouse lawyer is not the service of truth and justice, but rather self-aggrandizement, profit, and power. According to prison officials, whose expertise in such matters should be given some consideration, the jailhouse lawyer often succeeds in establishing his own power structure, quite apart from the formal system of warden, guards, and trusties which the prison seeks to maintain. Those whom the jailhouse lawyer serves may come morally under his sway as the one hope of their release, and repay him not only with obedience but with what minor gifts and other favors are available to them. When a client refuses to pay, violence may result, in which the jailhouse lawyer may be aided by his other clients."

"Krause, A Lawyer Looks at Writ-Writing, 56 Calif. L. Rev. 371 (1968); Spector, A Prison Librarian Looks at Writ-Writing,

It cannot be expected that the petitions which emerge from such a process will be of the highest quality. Codes of ethics, champerty, and maintenance, frequently have little meaning to the jailhouse lawyer, who solicits business as vigorously as he can. In the petition itself, outright lies may serve the jailhouse lawyer's purpose since by procuring for a prisoner client a short trip out of jail for a hearing on his contentions the petition writer's credibility with the other convicts is improved.

Habeas corpus petitions, as the majority notes, are relatively easy to prepare; they need only set out the facts giving rise to a claim for relief and the judge will apply the law, appointing a lawyer for the prisoner and giving him a hearing when appropriate. This fact does not buttress the unregulated jailhouse lawyer system, but undermines it. To the extent that it is easy to state a claim, any prisoner can do it, and need not submit to the mercies of a jailhouse lawyer. To the extent that it is difficult—and it is necessary to understand what one's rights are before it is possible to set out in a petition the facts which support them—there may be no fellow prisoner adequate to the task. There are some well informed and articulate prisoners and some (not necessarily the same) who give advice and aid out of altruism. When the two qualities are combined in one man, as they sometimes are, he can be a perfectly adequate source of help. But the jails are not characteristically populated with the intelligent or the benign, and capable altruists must be rare indeed. On the other hand, some jailhouse clients are illiterate; and whether illiterate or not, there are others who are unable to prepare their own petitions.

---

56 Calif. L. Rev. 365 (1968); Note, Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L. J. 343, 345–347; Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514, 520–522; Note, Prisoner Assistance on Federal Habeas Corpus Petitions, 19 Stan. L. Rev. 887, 891, n. 31 (1967).

They need help, but I doubt that the problem of the indigent convict will be solved by subjecting him to the false hopes, dominance, and inept representation of the average unsupervised jailhouse lawyer.

I cannot say, therefore, that petitioner Johnson, who is a convicted rapist serving a life sentence and whose prison conduct the State has wide discretion in regulating, cannot be disciplined for violating a prison rule against aiding other prisoners in seeking post-conviction relief, particularly when there is no showing that any prisoner in the Tennessee State Prison has been denied access to the courts, that Johnson has confined his services to those who need it, or that Johnson is himself competent to give the advice which he offers. No prisoner testified that Johnson was the only person available who would write out a writ for him or that guards or other prison functionaries would not furnish the necessary help. And it is really the prisoner client's rights, not the jailhouse lawyer's, which are most in need of protection.

If the problem of the indigent and ignorant convict in seeking post-conviction relief is substantial, which I think it is, the better course is not in effect to sanction and encourage spontaneous jailhouse lawyer systems but to decide the matter directly in the case of a man who himself needs help and in that case to rule that the State must provide access to the courts by ensuring that those who cannot help themselves have reasonably adequate assistance in preparing their post-conviction papers. Ideally, perhaps professional help should be furnished and prisoners encouraged to seek it so that any possible claims receive early and complete examination. But I am inclined to agree with MR. JUSTICE DOUGLAS that it is neither practical nor necessary to require the help of lawyers. As the opinions in this case indicate, the alternatives are various and the burden on the States

would not be impossible to discharge. This requirement might even be met by the establishment of a system of regulated trusties of the prison who would advise prisoners of their legal rights. Selection of the jailhouse lawyers by the prison officials for scholarship and character might assure that the inmate client received advice which would actually help him, and regulation of the "practice" by the authorities would reduce the likelihood of coerced fees or blackmail. The same legislative judgement which should be sustained in concluding that the evils of jailhouse lawyering justify its proscription might also support a legislative judgment that jailhouse lawyering under carefully controlled conditions satisfies the prisoner's constitutional right to help.

Regretfully, therefore, I dissent.